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Articles

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by
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More grandiose prose rarely is found than that used to describe the role of the presumption of innocence in Anglo-American criminal law. The presumption has been called the "golden thread" that runs throughout the criminal law,[1] heralded as the "cornerstone of Anglo-Saxon justice,"[2] and identified as the "focal point of any concept of due process."[3] Indeed, the presumption has become so central to the popular view of the criminal justice system, it has taken on "some of the characteristics of superstition."[4]

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1. A. CROSS, THE GOLDEN THREAD OF THE CRIMINAL LAW 2 (1976) (quoting Woolmington v. Director of Pub. Prosecutions, 1935 App. Cas. 462, 481 (Sankey, L.)).

2. H. ABRAHAM, THE JUDICIAL PROCESS 98 (5th ed. 1986).

3. S. HERTZBERG & C. ZAMMUTO, THE PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL PROCESS UNDER INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS 16 (1981) (citing provisions in various international agreements declaring the presumption of innocence a fundamental right).

4. C. ALLEN, LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 255 (1931). The beliefs surrounding the presumption of innocence are not always founded in reality. For example, the popular belief that only the Anglo-American criminal justice system presumes innocence generally is not true. *See id.* at 253 ("no authority" for widespread belief that France presumes guilt); *cf.* B. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE 6 (1987) (China and Soviet Union recognize limited presumption of innocence by placing burden of proof on government).

Moreover, Anglo-American criminal practice has not always accorded with the principle of presuming the defendant innocent. Medieval practices like trial by ordeal (carrying red hot irons in hands to prove innocence) and frankpledging (twelve respectable citizens must vouch for defendant's character) clearly meant that as a practical matter the defendant bore the burden of exculpating himself. *See generally* C. ALLEN, *supra* at 259-73 (arguing vestiges of "presumption of guilt" discernable as late as the nineteenth century). Moreover, outside political pressures, especially in treason trials, often meant that a guilty verdict was a foregone conclusion: "If a judge in those days had frankly charged a jury according to the facts of the situa-

In the criminal trial setting, the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant's guilt beyond a reasonable doubt.[5] The United States Supreme Court in *In re Winship*[6] formally recognized the reasonable doubt standard as constitutionally required, because the standard "provid[ed] concrete substance for the presumption of innocence." By placing a relatively high burden of persuasion on the government, the rule operates to ensure that even when significant evidence of guilt exists, the defendant will be acquitted if a reasonable doubt exists in the jury's mind. This deliberate imbalance in favor of the defendant is a societal judgment that an individual's liberty interest transcends the state's interest in obtaining a criminal conviction;[7] or, as more popularly phrased, "it is far worse to convict an innocent man than to let a guilty man go free."[8] The reasonable doubt rule thus serves as the means of giving the presumption of innocence constitutional meaning.

Few would dispute the importance of the presumption of innocence to our criminal justice system or fail to join in the plaudits. Behind the general praise, however, lie some very difficult questions. As the Supreme Court discovered soon after *Winship,* the most fundamental question is what constitutes innocence. Or, to phrase it conversely, if the government is required to prove guilt beyond a reasonable doubt, what facts make a defendant guilty of the crime? The question may sound exceedingly simple to answer, but the evidence is otherwise. At least three schools of thought have developed on the matter,[9] and the Supreme

tion it would have been in some such terms as these: 'If you acquit the prisoner I shall be dismissed and you will go to prison. Consider your verdict.' " J. MACDONELL, HISTORICAL TRIALS 192 (1927) (discussing treason trial of Sir Walter Raleigh).

5. Other safeguards, such as the right to an attorney and the right to a jury trial, also are aimed in part at ensuring the accuracy of the trial verdict. It is through the reasonable doubt standard, however, that the jury is directly told that the benefit of doubt in weighing the evidence must be given to the defendant. At one point, the Supreme Court even viewed the presumption of innocence as a piece of evidence in favor of the defendant. Coffin v. United States, 156 U.S. 432, 458-60 (1894). The presumption of innocence, however, is better viewed not as substantive evidence, but as a means of instructing the jury that the government bears the risk of nonpersuasion. *See generally* J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940) (" 'presumption of innocence' is . . . another form of expression for a part of the accepted rule . . . that it is for the prosecution . . . to produce persuasion beyond a reasonable doubt"); C. ALLEN, *supra* note 4, at 283-84 (characterizing *Coffin* as "arch-heresy"). The Supreme Court no longer views the presumption of innocence as a form of evidence. *Id.* at 284.

6. 397 U.S. 358, 363 (1970).

7. *Id.* at 363-64 (citing Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

8. *Id.* at 372 (Harlan, J., concurring).

9. The three approaches are expansive proceduralism, *see infra* notes 33-51 and accompanying text; restrictive proceduralism, *see infra* notes 52-76 and accompanying text; and substantivism, *see infra* notes 77-122 and accompanying text.

Court has attempted, rather unsuccessfully, to provide a coherent answer in four different cases subsequent to *Winship*.[10]

Before one dismisses the confusion as another example of the legal profession's ability to obfuscate even basic propositions, two background considerations must be remembered. First, the argument over the meaning of guilt and innocence in this context is a constitutional debate. *Winship* spoke of the constitutional requirement to prove beyond a reasonable doubt "every fact necessary to constitute the crime,"[11] but did not explain when a fact was "necessary" in a constitutional sense. The question more accurately stated, therefore, is not abstractly what is innocence, but what facts should the government *constitutionally* be required to prove beyond a reasonable doubt before the defendant can be found guilty.[12] Because the breadth of the Court's definition of guilt and innocence for the purposes of the reasonable doubt rule will correspond directly with the scope of the obligation placed on the states,[13] federalism concerns understandably counsel judicial caution in defining the rule's breadth.

The second factor explaining the uncertainty is that, despite the general platitudes praising the presumption of innocence, the presumption's operation requires choosing between competing societal interests. How far we extend the presumption of innocence is an issue of balancing society's interest in controlling crime and society's interest in not convicting innocent individuals.[14] Consider, for example, how the presumption of

10. *See* Martin v. Ohio, 480 U.S. 228, 236 (1987) (upholding placing the burden of proof for self-defense on defendant); McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (allowing preponderance of evidence standard for sentencing enhancement factor); Patterson v. New York, 432 U.S. 197, 210 (1977) (upholding placing burden of proof for "extreme emotional disturbance" on defendant); Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (placing burden of proof for heat of passion on defendant is unconstitutional). The Court also has struggled in the related area of presumptions and their effect on the burden of proof. *See infra* note 32.

11. *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

12. Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention,* 55 TEX. L. REV. 269, 270-71 (1977) (arguing the need to identify the constitutional interest at stake); Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law,* 88 YALE L.J. 1325, 1340-47 (1979) (must define innocence and guilt to determine reasonable doubt rule's scope).

13. *See generally* Allen, *supra* note 12, at 279-80 (federal interest must justify imposing procedure on states).

14. *Patterson,* 432 U.S. at 208 (scope of safeguards against convicting innocent must take into account society's interest in convicting guilty). *See generally,* C. ALLEN *supra* note 4, at 271-82 (explaining development of presumption of innocence as result of society's increased confidence in convicting guilty and in safety from crime). Justice Cardozo stated the proposition broadly for all procedures used to protect the accused: "[J]ustice, though due to the

innocence is often colloquially expressed: it is better to let ten guilty people go free than to convict one innocent person. Although one injustice is avoided in that the innocent individual is acquitted, an injustice also occurs in that ten guilty defendants escape punishment.[15] The level at which the presumption of innocence is set reflects society's weighing of these two injustices—acquitting the guilty and convicting the innocent—and at some point the cost of the presumption of innocence would be too great.[16] Few would advocate, for instance, that the government's burden of proof should be beyond all possible doubt[17] or, more vividly, that "it is

accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Snyder v. Massachusetts, 291 U.S. 97, 122 (1933).

15. *See generally* W. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT 290 (1845) (punishment of guilty and protection of innocent in general have "equal claim"); R. DUFF, TRIALS AND PUNISHMENTS 107 (1986) (a mistaken acquittal at a criminal trial is a matter of injustice); P. STEIN & J. SHAND, LEGAL VALUES IN WESTERN SOCIETY 81-82 (1974) (noting Criminal Law Revision Committee's view that "it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted.").

16. Beyond the notion that it is unjust for the guilty to escape punishment, a societal backlash may result if the public perceives that too many guilty individuals are escaping punishment. The police may become reluctant in their enforcement of the law or turn to illegal methods in an effort to end run the procedural protections. More generally, society will lose confidence in the government's ability to uphold public order and, as a result, may demand extremely severe penalties for those who are convicted. *See* R. DUFF, *supra* note 15, at 105; G. WILLIAMS, THE PROOF OF GUILT 157 (1958); *cf.* C. ALLEN, *supra* note 4, at 287 ("[W]e must never forget that ideally the acquittal of ten guilty individuals is exactly ten times as great a failure of *justice* as the conviction of one innocent person.") (emphasis in original).

17. As Glanville Williams observed:

> It is, then, a question of degree: some risk of convicting the innocent must be run. What this means in terms of burden of proof is that a case need not be proved beyond all doubt. The evidence of crime against a person may be overwhelming, and yet it may be possible to conjecture a series of extraordinary circumstances that would be consistent with his innocence—as by supposing that some stranger, of whose existence there is no evidence, interposed at the crucial moment and actually committed the crime, when all the evidence points to the fact that the accused was alone on the spot, or by supposing, on a charge of murder, that the deceased died of heart failure the moment before the bullet entered his body. The fact that these unlikely contingencies do sometimes occur, so that by neglecting them there is on rare occasions a miscarriage of justice, cannot be held against the administration of the law, which is compelled to run this risk.

G. WILLIAMS, *supra* note 16, at 159.

The beyond a reasonable doubt formulation apparently became prominent in the late 1700s, perhaps as early as the 1770s. *See* Morano, A *Reexamination of the Development of the Reasonable Doubt Rule,* 55 B.U.L. REV. 507, 515-20 (1975); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299, 1301-02 (1977). Professor Morano, in fact, suggests that the reasonable doubt rule was a lowering of the standard from a "beyond any doubt" standard. Morano, *supra,* at 515-16. A higher standard of proof than the reasonable doubt standard may still apply today outside the guilt-innocence determination, such as with the jury's decision on whether to impose the death penalty. *See*

better to let one million guilty people go free than to convict one innocent person."[18]

The above discussion is not intended to dispute the general proposition that the injustice of convicting an innocent person is a greater harm than acquitting a guilty individual. Whether treated as a moral,[19] constitutional,[20] or popular sentiment inquiry,[21] the greater injustice is almost universally seen in the conviction of the innocent.[22] The point simply is that a tension exists between "elevating the impulse of compassion" and acknowledging "the unlovely necessity of self-protection."[23] Given the

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Lockhart v. McCree, 476 U.S. 162, 181 (1986) ("[t]he defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase"); Smith v. Balkcom, 660 F.2d 573, 580 (5th Cir. 1981) ("The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.") (emphasis in original). *See generally* Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21, 81-83 (1987) (discussing the impact of "lingering doubt" on jury's sentencing decision).

18. I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no sensible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security.

C. ALLEN, *supra* note 4, at 286-87; *see also* G. WILLIAMS, *supra* note 16, at 158-59 (discussing quantum of proof required).

19. *See, e.g.,* R. DUFF, *supra* note 15, at 108-09 ("moral harm" of punishing innocent greater than acquittal of guilty); P. STEIN & J. SHAND, *supra* note 15, at 59-63 (discussing Aristotelian justice as favoring innocent individual's freedom from punishment over societal interests in public order).

20. *See, e.g., In re* Winship, 397 U.S. 358, 363-64 (1970) (due process claim protects innocent from being adjudged guilty except when "utmost certainty" of guilt).

21. *See generally* C. ALLEN, *supra* note 4, at 253-55 (discussing popular support for presumption of innocence); W. BEST, *supra* note 15, at 291-92 (describing decline of public confidence in criminal justice system if public believes innocent individuals are being convicted).

22. Some dissenting voices have been raised. Sir Stephen expressed reservations over whether it was always better that ten guilty individuals be set free. He argued that "[e]verything depends on what the guilty have been doing . . . ." J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 438 (1881). Paley argued that the superior interest was in convicting the guilty to maintain the "security of civil life" and that an innocent individual erroneously convicted ought to be "considered as falling for his country." W. PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 356 (9th Am. ed. 1818). Paley's analogy to the fallen soldier has been labeled an "inhuman argument" because, unlike the soldier killed in battle, the wrongly convicted does not fall in honor but is "branded with public ignominy." W. BEST, *supra* note 15, at 292. *See generally* G. WILLIAMS, *supra* note 16, at 154-58 (discussing arguments against the presumption of innocence).

23. C. ALLEN, *supra* note 4, at 294.

limits of investigatory techniques and human knowledge, a system that convicts only the guilty is generally acknowledged to be impossible.[24] The presumption of innocence and how far it extends is a manifestation of how great a margin of error society is willing to tolerate. Part of the constitutional answer to what constitutes innocence and guilt within the beyond a reasonable doubt rule must accommodate a state's need to respond to the risk of erroneous acquittal as well as erroneous conviction.

This Article begins by analyzing the three basic approaches that the courts and commentators have taken to reconcile the competing interests raised by the presumption of innocence. As would be expected, each approach reflects differing views of federalism concerns and of how to weigh properly the risk of convicting the innocent against the danger of acquitting the guilty. After exploring each approach's particular strengths and weaknesses, the conclusion is reached that the Court should return to a position basically in accord with its holding in *Mullaney v. Wilbur*.[25] The argument for reembracing *Mullaney*'s broad view of the reasonable doubt rule's scope is founded on the role of the presumption of innocence in the criminal trial and on the alternatives available to curtailing the scope of the reasonable doubt rule.

I. The Many Meanings of Innocence

The constitutional debate over the meaning of innocence for the purposes of the presumption of innocence is a relatively recent development spurred primarily by the Court's decisions in *Mullaney v. Wilbur*[26] and *Patterson v. New York*.[27] Those decisions provoked much discus-

24. *See generally* R. DUFF, *supra* note 15, at 109 (any practical system of criminal trials runs the risk of convicting some who are innocent); J. HEATH, EIGHTEENTH CENTURY PENAL THEORY 36-37 (1963) (noting imperfections of trial); G. WILLIAMS, *supra* note 16, at 259 (miscarriages of justice may result from different formulations of quantum of proof required); Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 229-41 (1966) (discussing "fundamental limitations" inherent to triers of fact).

25. 421 U.S. 684 (1975). For a discussion of *Mullaney*, see *infra* notes 35-45 and accompanying text.

26. *Id.*

27. 432 U.S. 197 (1977). Although many have reflected on the presumption of innocence, *see, e.g.*, authorities cited *supra* notes 1-4 & 15, the discussions have tended to focus on the presumption's desirability generally and not its specific applications. *But see* A. CROSS, *supra* note 1, at 10-18 (discussing need to extend reasonable doubt rule beyond existing practice); G. WILLIAMS, *supra* note 16, at 152-54 (criticizing Parliament's placing burden of proof on defendant for issues affecting innocence). The lack of debate may in part be because it was not until 1970 that the Court even formally recognized that the reasonable doubt rule was constitutionally required. *See supra* note 6 and accompanying text.

sion,[28] but neither a judicial nor a scholarly consensus emerged in defining innocence for determining when the reasonable doubt rule applies. From the cases and commentary, three basic views of the reasonable doubt rule's scope can be identified: expansive proceduralism, restrictive proceduralism, and substantivism. As a look at these three approaches reveals, each has its particular advantages and shortcomings in light of the previously defined concerns of federalism and the balancing of society's interests.

A. The Two Strains of Proceduralism

The essence of a procedural approach is the premise that the presumption of innocence, and hence the reasonable doubt rule, attaches to all facts included within the legislature's definition of a crime.[29] Viewed

28. *Mullaney* in particular resulted in a flurry of commentaries. *See, e.g.,* Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges,* 29 ARK. L. REV. 429 (1976); Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. REV. 775 (1975); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant,* 64 GEO. L.J. 871 (1976) (authored by Robert M. Gordon); Note, *Due Process and the Insanity Defense: Examining Shifts in the Burden of Production,* 53 NOTRE DAME L. REV. 123 (1977) (authored by James M. Varga); Note, *The New York Penal Law's Affirmative Defenses After* Mullaney v. Wilbur, 27 SYRACUSE L. REV. 834 (1976); Note, *Constitutional Law—The Burden of Proof for Affirmative Defenses in Homicide Cases,* 12 WAKE FOREST L. REV. 423 (1976) (authored by John E. Nobles, Jr.); Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code,* 28 BAYLOR L. REV. 120 (1976) (authored by Gerald Reading Powell); Comment, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance,* 43 BROOKLYN L. REV. 171 (1976) (authored by Daniel Shapiro); Comment, *Constitutional and Legislative Issues Raised by the Entrapment Defense in Maine,* 29 ME. L. REV. 170 (1977); Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975) (authored by Stephen D. Brandt); Comment, Mens Rea, *Due Process and the Burden of Proving Sanity or Insanity,* 5 PEPPERDINE L. REV. 113 (1977) (authored by Daniel K. Spradlin); Comment, *The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion,* 11 U.S.F. L. REV. 123 (1976) (authored by James M. Boyer).

Patterson also generated considerable discussion. *See, e.g.,* Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977); Eule, *The Presumption of Sanity: Bursting the Bubble,* 25 UCLA L. REV. 637, 677-83 (1978); Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655 (1978) (authored by Celia Goldwag); Note, *Burden of Proving Affirmative Defense Can Be Placed on Defendant,* 29 MERCER L. REV. 875 (1978) (authored by James B. Talley, Jr.); Note, *Criminal Law—Affirmative Defenses—Burden of Proof*—Patterson v. New York, 23 N.Y.L. SCH. L. REV. 802 (1978) (authored by Theodore L. Hecht); Note, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of* Patterson v. New York, 39 OHIO ST. L.J. 393 (1978) (authored by Mark R. Adams); Note, *Criminal Law; Affirmative Defenses in Criminal Trials: What Are the Limits after* Patterson v. New York, 31 OKLA. L. REV. 411 (1978) (authored by Lawrence M. Ward).

29. The most prominent advocates of a procedural approach are Dripps, *The Constitutional Status of the Reasonable Doubt Rule,* 75 CALIF. L. REV. 1593 (1987); Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices,* 20 AM. CRIM. L.

as a procedural protection, the reasonable doubt rule does not require a court to assess independently the importance of different facts within the crime's definition: if facts *A, B,* and *C* are each part of the crime's definition, then all must be proven beyond a reasonable doubt to satisfy due process. Just as the criminal defendant has the procedural right to have the jury decide every question of fact no matter how overwhelming the evidence against him,[30] the proceduralist views the reasonable doubt rule as attaching to every fact that is part of the crime's definition.

As a general proposition, the procedural approach avoids making difficult distinctions between facts for determining when the reasonable doubt rule applies. The proceduralist leaves the defining of the facts constituting the crime to the legislature, arguing simply that once the facts have been identified, the rule's procedural protections attach. In determining when the rule constitutionally applies, therefore, a court looks only at what facts are included within the crime's definition and does not evaluate their substantive importance in defining culpability.

Even within the proceduralist school, however, differences have arisen over how far the presumption of innocence applies. The major difference centers on how to decide what facts within a legislative scheme are actually part of the crime's definition, or, in *Winship*'s terminology, are "necessary to constitute the crime."[31] The primary issue that has been argued is whether the facts requiring proof beyond a reasonable doubt include facts relating to affirmative defenses or only those facts that the legislature has labeled as "elements" of the crime.[32] For exam-

REV. 393 (1983); and Underwood, *supra* note 17. Although the authors differ somewhat in their approaches to and rationale for proceduralism, they all emphasize relying on the legislative designations of fact for controlling when the reasonable doubt rule applies.

30. *See* Sandstrom v. Montana, 442 U.S. 510, 523 (1979); United States v. U.S. Gypsum, 438 U.S. 422, 446 (1978).

31. *In re* Winship, 397 U.S. 358, 364 (1970).

32. As used in this Article, an affirmative defense is an issue that either lessens or relieves the defendant of criminal responsibility even if the formal elements of the crime have been proven.

Burden of proof problems can also arise if a presumption is used in relation to an element of the crime or a defense. A presumption is an evidentiary device that enables the trier of fact to conclude that the ultimate fact (the fact to be proved) exists from proof of a basic fact. *See* C. MCCORMICK, EVIDENCE § 11 (2d ed. 1972). If the jury is told it must presume that a defendant "intends the ordinary consequences of his voluntary acts," the effect is to relieve the state of the burden of persuasion on the ultimate fact (the defendant's intent) once it has proven the basic fact (the defendant did the act). Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979). Similarly, if a jury is told to presume the ultimate fact from proof of the basic fact unless the defendant proves otherwise by a preponderance of the evidence, the effect is to place the burden of persuasion on the defendant. *Id.* at 524.

The Court has begun to develop an approach to the presumptions based on the type of presumption involved. *See* Ulster County Court v. Allen, 442 U.S. 140, 156-57 (1979) (distin-

ple, some jurisdictions define murder simply as the intentional killing of a human being, but allow acquittal if the defendant was insane or acted in self-defense. The proceduralist must decide whether the crime's definition is confined to the intentional killing or extends to the defenses of insanity and self-defense as well. Two strains of proceduralism have emerged from this debate quite at odds with each other.

(1) Expansive Proceduralism

The broadest view of the reasonable doubt rule as a procedural right would attach the rule to every fact affecting the defendant's criminal liability. Whether a particular fact was labelled a defense, a mitigating factor, or an element of the crime, the key test would be whether the fact is used by the state to justify a particular criminal sanction. The approach is label neutral in that it views the constitutional threshold not as resting on how the state uses the factor—as a defense, a presumption, or as part of the crime's definition—but on the state's decision to use the factor as a basis for determining criminal guilt and punishment.[33]

Expansive proceduralism's greatest appeal is its recognition that criminal guilt consists not only of a finding that certain acts and mental states were present, but also of a finding that the behavior was not justified or excused as defensible. The approach reflects a holistic view of criminality which holds that an otherwise condemnable act must be understood within the context of legally recognized extenuating circumstances.[34] Thus, a murder conviction is not simply a finding of an intentional killing (basic *mens rea* and *actus reus*), but also a conclusion that the act was unlawful because no relevant defense was available. To the expansive proceduralist, because the absence of defenses is part of the finding of criminal guilt, their absence must be proven beyond a reasonable doubt.

guishing mandatory presumptions and permissive inferences). The Court's presumption analysis, however, has not been entirely consistent. *See* Roth & Sundby, *The Felony-Murder Rule: A Doctrine At Constitutional Crossroads,* 70 CORNELL L. REV. 446, 468-69 (1985) (noting potential contradictions between *Sandstrom* and *Allen*). The Court's presumption analysis is beyond this Article's formal scope, although the proposed view of the presumption of innocence, if adopted, undoubtedly would bear on what presumptions are constitutional. *Cf. id.* at 477-78 (permissive inferences least likely to conflict with presumption of innocence).

33. *See generally* Underwood, *supra* note 17, at 1347-48.

34. Professor Fletcher, for example, argues that the history of burdens of proof in the criminal law is marked by a movement towards a "comprehensive" view of "[d]efensive issues, like self-defense and insanity . . . not as exceptions, but as denials of liability . . . ." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 892 (1968). The comprehensive view of criminal liability "impose[s] a unified structure on the issues related to the blameworthiness of the defendant's conduct." *Id.* at 893.

The closest the Supreme Court came to an expansive proceduralist view was in *Mullaney v. Wilbur.*[35] *Mullaney,* the first significant case dealing with the reasonable doubt rule after the Court's decision in *Winship,* addressed whether the rule extended to the issue of heat of passion in distinguishing between murder and manslaughter. Under Maine's homicide scheme, an intentional or criminally reckless killing was a felonious homicide absent a justification or excuse.[36] The felonious homicide, in turn, was punished as murder unless the defendant was able to reduce the crime to manslaughter by proving with a preponderance of the evidence that he acted in the heat of passion.[37]

The state argued that because under Maine law heat of passion did not become relevant until after the jury had convicted the defendant of the crime of felonious homicide, all the "facts necessary to constitute the crime" already had been proven beyond a reasonable doubt. Heat of passion, therefore, was merely a factor for grading and punishing the crime of felonious homicide, but was not itself part of the crime's definition. In support of its position, the state noted that even if heat of passion was proved, the defendant was still convicted of a crime.[38]

In rejecting the state's argument, Justice Powell's opinion reflected strong proceduralist overtones with potentially far reaching implications. Although conceding that heat of passion was not part of the crime's definition "as a formal matter," Justice Powell argued that the criminal law was concerned with the degree of culpability, not just "guilt or innocence in the abstract."[39] Noting the significant difference in the penalties attaching to murder and manslaughter, Justice Powell concluded that not placing the burden of proof on the state

> denigrates the interest found critical in *Winship* . . . . Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.[40]

35. 421 U.S. 684 (1975).

36. ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (current version at ME. REV. STAT. ANN. tit. 17A, § 201 (1983 & Supp. 1988)).

37. *Mullaney,* 421 U.S. at 700-04. The trial court had instructed the jury that once the state proved that the defendant had acted intentionally and unlawfully, malice aforethought was conclusively implied unless the defendant proved by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation. *Id.* at 691-92.

38. *Id.* at 696-97.

39. *Id.* at 697-98.

40. *Id.* at 698. Under Maine law murder was punished by life imprisonment and manslaughter by a maximum imprisonment of twenty years. ME. REV. STAT. ANN. tit. 17, § 2651 (1964).

By looking beyond the "formal" definition of the crime and at the "operation and effect of the laws as applied and enforced,"[41] the majority was espousing a holistic view of criminal behavior. The opinion viewed a criminal conviction and the imposition of punishment as an intersection of all relevant facts bearing on criminal culpability. Given this perspective, the majority viewed the safeguards of due process in the form of the reasonable doubt rule as applying to facts that bear on the level of culpability, such as heat of passion, even if not part of the crime's formal definition.

A broad reading of *Mullaney* aptly illustrates the various aspects of expansive proceduralism. In federalism and separation of power terms, the doctrine is something of an oxymoron—both deferential to and intrusive on the states' and legislatures' power to define crimes. The approach is deferential because it leaves the substance of the crime primarily to the legislature. The reasonable doubt rule is not used as an instrument for examining which facts within the scheme are essential to guilt or as a means of "deciding the outposts . . . of . . . substantive criminal law."[42]

Once the legislature settles on a definition, however, the reasonable doubt rule attaches and is essentially beyond legislative control. Reflecting the holistic orientation toward defining crime, the presumption of innocence and its purpose of precluding erroneous convictions goes to all facts that the legislature has chosen to make relevant to the crime's punishment. If, as in *Mullaney,* the legislature chooses to distinguish between murder and manslaughter based on heat of passion, then the presumption of innocence attaches, and the state must prove beyond a reasonable doubt that heat of passion was absent before the defendant can be convicted of murder. The presumption of innocence is seen as pervading all factors within the legislative scheme, as Justice Powell made evident in paraphrasing the old adage that it is worse to convict an innocent person than to set a guilty person free: "it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter."[43]

By making the reasonable doubt rule attach to all facts, the expansive proceduralist also precludes a legislature from manipulating a crime's formal definition to avoid the strictures of the reasonable doubt rule. Because all facts relevant to punishment are within the aegis of the

41. *Mullaney,* 421 U.S. at 699 (quoting St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350, 362 (1914)).

42. Patterson v. New York, 432 U.S. 197, 228 (1977) (Powell, J., dissenting) (arguing that *Mullaney* was a procedural decision not intruding on the substantive criminal law).

43. *Mullaney,* 421 U.S. at 703-04.

presumption of innocence, a legislature cannot evade the reasonable doubt rule simply by recasting a fact as a defense or as a factor for punishment. In *Mullaney,* for example, Maine's homicide statute, formally speaking, made involuntary manslaughter only a punishment category of the generic offense of felonious homicide.[44] Consequently, without an expansive proceduralist's approach of looking at the effect of the fact at issue, the state could define felonious homicide broadly as a negligent killing and require the defendant to prove that he neither intentionally nor criminally recklessly killed before reducing the crime to involuntary manslaughter.[45]

The expansive proceduralist viewpoint, especially as given voice in *Mullaney,* did not meet universal acceptance.[46] Although the issue is explored more fully later,[47] the approach's broad definition of "innocence"—extending the presumption of innocence to all facts relevant to guilt and punishment—has been challenged as lacking a constitutional foundation.[48] According to its critics, *Mullaney*'s constitutional flaw—and a flaw of proceduralism in general—is that it extends the presumption of innocence and the reasonable doubt rule to facts that the state is not constitutionally required to prove in the first place.[49] Thus, proceduralism intrudes on the legislative power to control the burden of proof by classifying facts as elements, defenses, or mitigating factors when the fact's inclusion is itself within the state's discretion.

Moreover, the expansive proceduralists' tipping of the balance strongly in favor of avoiding erroneous jury determinations on all factors affecting guilt and punishment has been argued as ultimately counterproductive. Although *Mullaney* required that a fact affecting guilt or punishment be proven beyond a reasonable doubt, the opinion's reason-

44. *Id.* at 691-92.

45. *Id.* at 688-89. Justice Powell voiced the concern even more dramatically in *Patterson,* in which he suggested that without such a view a state could define "murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea.*" 432 U.S. at 224 n.8 (Powell, J., dissenting). Justice Powell later conceded that he had "no doubt that the Court would find some way to strike down" such a statute. *Id.* at 225 n.9.

46. The most comprehensive criticisms were articulated in Allen, *supra* note 12, and Jeffries & Stephan, *supra* note 12.

47. *See infra* notes 77-80 and accompanying text.

48. *See* Jeffries & Stephan, *supra* note 12, at 1348 ("federal constitutional law appropriately should require proof beyond a reasonable doubt of those matters that the state is constitutionally required to establish").

49. *See* Allen, *supra* note 12, at 285-86 ("So long as a state defines a crime in a constitutionally permissible manner and ensures that all constitutionally relevant facts are proven beyond a reasonable doubt, then there appears to be no basis upon which federal courts may intervene . . . .").

ing did not preclude abolishing the fact from the legislative scheme altogether.[50] As a result, some have suggested that legislatures faced with the state's having to prove a particular defense beyond a reasonable doubt may decide that the increased risk of acquitting a guilty individual is not justified and abolish the defense entirely. If such a situation materialized, law reform would be impeded because legislatures faced with the price tag of the reasonable doubt rule would eschew recognizing affirmative defenses as too costly in law enforcement terms. Consequently, the proceduralists' deference to the legislature to define the criminal law's substance becomes their own undoing, because legislatures will eliminate certain facts to avoid the procedural consequences that would automatically attach.[51]

(2) The Move to Restrictive Proceduralism

Although Justice Powell suggested that *Mullaney*'s holding might be limited to cases in which the issue in question historically had been recognized as an important factor,[52] the opinion's broad implications were not lost on the commentators and courts. The opinion was cited frequently as pointing to the end of defenses and presumptions that shifted the burden of proof to the defendant.[53] By evincing a willingness to look beyond the state's designation of who bore the burden of persuasion, the Court had raised a "*Mullaney* question" regarding any factor significantly affecting the defendant's conviction and punishment.

50. Justice Powell in defending *Mullaney* later argued:

> *Winship* and *Mullaney* specify only the procedure that is required when a State elects to use such a factor as part of its substantive criminal law. They do not say that the State must elect to use it. For example, where a State has chosen to retain the traditional distinction between murder and manslaughter, as have New York and Maine, the burden of persuasion must remain on the prosecution with respect to the distinguishing factor, in view of its decisive historical importance. But nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.

Patterson, 432 U.S. at 228 (Powell, J., dissenting).

51. Jeffries & Stephan, *supra* note 12, at 1353-56 (disallowing legislative control over burdens of proof for affirmative defenses "would work to inhibit reform and induce retrogression in the penal law"); *see also Patterson,* 432 U.S. at 214 n.15 (suggesting congressional proposal to provide affirmative defense to felony-murder might be abandoned if government would be required to bear burden of proof).

52. The limitations were implicit in *Mullaney,* 421 U.S. at 692-701. Justice Powell in his *Patterson* dissent expressly advocated a test requiring that the fact historically have made a substantial difference in punishment and stigma. *Patterson,* 432 U.S. at 226 (Powell, J., dissenting). Although the limits suggest *Mullaney* was not a pure expansive proceduralist decision, the orientation clearly was proceduralist. *See infra* notes 184-87 and accompanying text.

53. *See* cases cited in Allen, *supra* note 12, at 270 n.9; Allen, *supra* note 28, at 35 n.26; Jeffries & Stephan, *supra* note 12, at 1340 n.40; commentators cited *supra* note 28.

In *Patterson v. New York*[54] the Court eventually faced *Mullaney*'s implications and made evident that *Mullaney* was not to be construed broadly. Patterson's challenge to his murder conviction essentially was identical to the defendant's argument in *Mullaney.* He argued that New York had violated his due process rights by requiring him to prove extreme emotional disturbance—New York's version of heat of passion—by a preponderance of the evidence before being found guilty of manslaughter instead of murder.[55]

Despite the fact that heat of passion operated under both the Maine and New York schemes as the dividing line between murder and manslaughter, a majority of the Court affirmed Patterson's murder conviction. Intriguingly, however, the *Patterson* Court did not reject *Mullaney*'s procedural orientation in favor of a test that would look at the fact's substantive nature in deciding whether the rule applied. Instead, *Patterson* simply limited the procedural protections of the reasonable doubt rule to those facts encompassed within the state's formal definition of the crime.[56] What became determinative was not whether heat of passion functionally distinguished murder from manslaughter, but whether New York had expressly defined murder as including the absence of heat of passion. Because New York's definition of second degree murder only required an intent to kill, the majority concluded that the state was not also constitutionally obliged to prove that the intentional killing was not done in the heat of passion. *Mullaney*'s contrary result was explained as deriving from Maine's defining murder in terms of *malice aforethought,* which by implication included the absence of heat of passion as an element of the crime.[57] *Patterson* thus retained a

54. 432 U.S. 197, 214-15 (1977).

55. *Id.* at 198-201. Although New York called its affirmative defense "extreme emotional disturbance," the defense is basically a modernized version of heat of passion. *See id.* at 218-20 (Powell, J., dissenting) (discussing origins of extreme emotional disturbance defense in New York). Patterson's defense will be referred to as a heat of passion claim to facilitate the comparison with *Mullaney.*

56. *Id.* at 215. The *Patterson* majority rephrased *Winship*'s requirement that the state prove "every fact necessary to constitute the crime" to "all of the elements *included in the definition of the offense* of which the defendant is charged." *Id.* at 210 (emphasis added).

57. *Id.* at 212-16.

> [M]alice, in the sense of the absence of provocation, was part of [Maine's] definition of [murder]. Yet malice, *i.e.,* lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation.

Id. at 215-16. The *Patterson* majority went to great lengths to justify its decision as consistent with *Mullaney. Id.* at 214-16. The majority did concede that "[t]here is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability,' " but claimed that "[t]he Court did not intend *Mullaney* to have such far-reaching

procedural approach, but greatly restricted the reasonable doubt rule's constitutional reach by drawing a significantly smaller due process circle for the facts to which the rule would apply. The reasonable doubt rule now constitutionally applied only to those facts which the legislature elected to call elements of the crime.

The earmark of the restrictive procedural approach is the discretion it places in the legislature to control not only the substance of the criminal law but the procedural operation of the reasonable doubt rule as well. As long as a state is careful to label a fact a "defense" or "mitigating factor" and not an "element" of the crime, it is virtually free to shift the burden of proof.[58] An independent constitutional role for the reasonable doubt rule, immune from legislative manipulation, is highly restricted. The *Patterson* majority did note that broad limitations existed on the states' ability to shift the burden of proof. The majority's example—that a legislature could not " 'declare an individual guilty or presumptively guilty' "—suggests, however, that a legislature must go fairly far in shifting the burden of proof before the reasonable doubt rule becomes constitutionally required beyond the state's labelling of the facts.[59]

The Court's movement to restrictive proceduralism, refusing to look at a fact's effect in defining innocence and instead focusing on the state's formal definition of the crime, is starkly evident in *Martin v. Ohio.*[60] In *Martin,* Ohio defined murder as "purposely causing the death of another with prior calculation or design" and required the defendant to prove self-defense by a preponderance of the evidence.[61] The defendant argued that such a scheme violated due process because a purposeful killing could still be lawful if done in self-defense, yet the defendant bore the burden of persuasion on self-defense. In a remarkably brief opinion, the majority upheld the placing of the burden of proof on the defendant for self-defense because the prosecution still had to prove beyond a reason-

effect." *Id.* at 214 n.15. Justice Powell, the author of *Mullaney,* saw otherwise: "[The majority's] explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision." *Id.* at 222-23 (Powell, J., dissenting).

58. Justice Powell argued that the majority's holding turned *Winship* and *Mullaney* into "rather simplistic lesson[s] in statutory draftsmanship." *Id.* at 224. The approach represented by restrictive proceduralism might also be called an "elements test." *See* Allen, *supra* note 28, at 48-50.

59. 432 U.S. at 210-11 (quoting McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916)). The majority's examples focus on situations in which the burden of persuasion is shifted to the defendant for *all* elements of the crime—cases which effectively eliminate the presumption of innocence in its entirety.

60. 480 U.S. 228 (1987).

61. OHIO REV. CODE ANN. § 2903.01 (Anderson 1982) defines murder. Self-defense, as an affirmative defense, is controlled by § 2901.05(A), which places the burden of proof by a preponderance of the evidence on the defendant.

able doubt all the express "elements" of murder as defined by the state—a purposeful killing with prior calculation and design.[62] The majority did indirectly acknowledge that although purposeful, a legitimate self-defense killing absolved the defendant of guilt—"[Mrs. Martin] had the opportunity to . . . *justify the killing and show herself to be blameless* by proving . . . self-defense"[63]—but accepted the state's argument that under state law an unlawful killing was formally proven simply upon the showing of the purposeful killing.[64] The *Martin* opinion stands as a strong endorsement of the principle that the presumption of innocence applies to those facts to which the state decides the presumption should apply and does not have an independent constitutional basis apart from the legislature's definition.

Restrictive proceduralism in effect limits the procedural rationale for the reasonable doubt rule to the narrow class of cases in which a state refuses to follow its own law and procedures.[65] The classification of a

62. 480 U.S. at 232. The dissent expressed concern that because evidence of self-defense also frequently will bear on a finding of prior calculation and design, instructing the jury that the defendant bears the burden of persuasion on self-defense created an inconsistency with the instruction that the state must prove *mens rea* beyond a reasonable doubt. Given this inconsistency, the dissent argued that even *Patterson* must disallow the self-defense instruction as effectively relieving the state of its burden of persuasion on an element of the crime. *Id.* at 237-42 (Powell, J., dissenting). The majority, however, believed that the jury instructions adequately instructed that self-defense evidence could be considered in deciding if the state met its burden of persuasion on prior calculation and design whether or not the evidence was sufficient to establish the affirmative defense of self-defense. *Id.* at 233-34.

63. *Id.* (emphasis added).

64. The majority's refusal to view the legislative scheme holistically is evident in its rejection of the defendant's argument that because under Ohio law unlawfulness is an element of murder, her self-defense claim should be seen as bearing on the element of unlawfulness. The majority agreed that unlawfulness is "essential for conviction" but argued that the Ohio courts had held as a matter of state law that unlawfulness was satisfied by a purposeful killing. *Id.* at 235 (citing State v. Morris, 8 Ohio App. 3d 12, 18-19 (1982)).

The majority did not blink in endorsing a state interpretation of unlawfulness that completely ignores that self-defense under Ohio law *does* make the homicide lawful in that the homicide is no longer punishable as a crime. In a classic example of the tail wagging the dog, the state interpretation relied upon did not interpret unlawfulness based on the legality of the defendant's acts, but out of a concern over the effect on burdens of proof:

> Once the prosecution has proven each element of felonious assault, the prosecution has proven the unlawfulness of defendant's acts. When the accused asserts an affirmative defense as a justification for an otherwise unlawful act, the burden of proving that justification can be constitutionally assigned to the accused . . . . A contrary ruling would mean that the state is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be "lawful."

Id. (citing *Morris*, 8 Ohio App. 3d at 18-19). As a result, unlawfulness under Ohio law is defined not by what is legal or illegal under the law, but by who bears the burden of proof under the legislative scheme.

65. *See* Allen, *supra* note 12, at 281 n.69 (examining argument that *Mullaney* is best seen

fact as an "element" or a "defense" is primarily the state's province, but once classified as an element a fact must be proven beyond a reasonable doubt because it has become "a fact *which the state deems so important* that it must be either proved or presumed."[66] Under this analysis, Maine violated due process in *Mullaney* because the state defined murder as including the absence of heat of passion and thus "deem[ed]" it "so important" that it had to be proven beyond a reasonable doubt.[67] New York in *Patterson* and Ohio in *Martin,* on the other hand, did not call the defenses in issue "elements" of the crime, so they did not extend any similar procedural promise to the defendant.

Restrictive proceduralism reflects a strong deference—some might say capitulation—to federalism and separation of power concerns. Justice White in the *Patterson* majority opinion stressed that the substance and procedure of the criminal law is "much more the business of the States than it is of the Federal Government."[68] Moreover, by giving the legislatures primary control over the reasonable doubt rule, Justice White argued that the states would have the needed flexibility to weigh the costs of a high burden of proof standard, which carries the risk that guilty individuals will be acquitted: "[due process requires] only [that] the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch."[69] Justice White also suggested that by not requiring the state to bear the burden of proof on affirmative defenses, legislatures would be more willing to experiment with law reform.[70]

Although *Patterson* was in part a response to *Mullaney*'s critics, the Court's reasoning satisfied few.[71] From an expansive proceduralist viewpoint, *Patterson* took the virtues of proceduralism and turned them into

as a case in which a state court reinterpreted state law to avoid a constitutional requirement); *cf.* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945) (Court will not accept state court interpretation when it is "obvious subterfuge to evade consideration of a federal issue"). The Court in *Mullaney* expressly rejected at the outset the defendant's argument that the Maine Supreme Court had reinterpreted state law to avoid *Winship.* 421 U.S. at 690-91.

66. Patterson v. New York, 432 U.S. 197, 215 (1977) (emphasis added).

67. *Id.* (explaining *Mullaney* as case in which state did not prove its own definition of murder).

68. *Id.* at 201 (citing Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion)); *see also Martin,* 480 U.S. at 232 (criminal law and procedure are primarily states' responsibility).

69. *Patterson,* 432 U.S. at 210.

70. *Id.* at 214-15; *see also supra* notes 50-51 and accompanying text (criticisms of expansive proceduralism as inhibiting law reform).

71. Even those who defended the *Patterson* result rejected the majority's reasoning to the extent it relied on legislative labels. *See* Allen, *supra* note 28, at 48-50; Jeffries & Stephan, *supra* note 12, at 1343-44.

vices. *Mullaney*'s holistic view of the interaction between defenses and elements of the crime in determining culpability became a fracturing of facts into categories dependent upon the legislature's verbal formula. Proceduralism's deference to the state's definition of the substance of a criminal defense now became a license to shift the burden of proof "virtually at will" by simply attaching the label of defense or element to the fact in issue.[72]

Moreover, to *Mullaney*'s detractors, restrictive proceduralism was subject to the same criticism as expansive proceduralism. The approach failed to provide a constitutional justification for applying the reasonable doubt rule beyond the appearance of the fact in the state's definition of the crime. *Mullaney* at least articulated a rationale for applying the reasonable doubt rule based upon a fact's effect on culpability and punishment and the danger of erroneous convictions.[73] *Patterson,* on the other hand, practically abandoned any underlying rationale for applying the rule.[74] Consequently, *Patterson*'s holding was subject to criticism as determining whether the reasonable doubt rule applies based on the formalistic and arbitrary criterion of a fact's "physical location" within the statute.[75] *Patterson*'s reasoning essentially bases the reasonable doubt rule's applicability on a syntactical analysis removed from any articulated constitutional justification.[76]

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72. *Patterson,* 432 U.S. at 225 (Powell, J., dissenting).

73. *See supra* notes 39-43 and accompanying text.

74. This omission was highlighted in *Martin,* in which the majority did not even mention the presumption of innocence or concepts of innocence in deciding that the burden of proof could be shifted for self-defense. The *Martin* majority did not even cite, let alone discuss, *Mullaney.*

75. Allen, *supra* note 28, at 48-50; Jeffries & Stephan, *supra* note 12, at 1343-44. Professor Allen, however, argues that *Patterson* must be based on other principles as well, in part because the physical location rule is so arbitrary. Allen, *supra* note 28, at 50. *But see infra* note 88.

76. The emphasis on the legislature crafting "the right verbal formula," *Patterson,* 432 U.S. at 223 n.7 (Powell, J., dissenting), begins to resemble the method used to interpret the German Civil Code:

> Civilian judges, working with law codified at its core, express the spirit of their system by relying on applicable code provisions to formulate issues. German scholars, for example, have worked out an elaborate scheme for determining whether according to the Code an issue is an element of the rule or an exception to it. If the issue appears in a subordinate clause introduced by phrases like "unless" or "so far as . . . not," the German courts will treat the issue as an exception to the rule of the main clause. But not all issues appearing in subordinate clauses are treated as exceptions. The syntactical analysis is often refined: it is of controlling importance, for example, whether the word "not" appears at the beginning or near the end of the subordinate clause.

B. The Substantivist Approach: The Search for a Definition of Innocence Within the Constitution

In response to the procedural approaches represented by *Mullaney* and *Patterson,* several commentators developed a substantive approach to defining innocence for determining when the reasonable doubt rule applies.[77] The substantive school argues that the proceduralists beg the question of what is "necessary" to constitute the crime charged. A substantivist believes that just because a fact is included within a crime's definition or is a possible defense does not mean that the fact is "necessary" to constitute the crime charged. Instead, the substantivist contends that a fact is "necessary" for the rule's purposes only if its presence or absence is constitutionally required before the state can impose criminal punishment.[78] In other words, certain facts within a crime's definition may be gratuitous from a constitutional viewpoint: the state has included a fact as a prerequisite to a criminal conviction, but constitutionally could punish the behavior without the fact's inclusion. The substantivist school would constitutionally require the reasonable doubt rule to apply only to those facts with which the state could not dispense in defining and punishing the crime.[79] The substantivist asks the Court to do no less than search for a constitutional definition of innocence, identifying those factors that the state must prove (and, therefore, prove beyond a reasonable doubt) before criminal culpability can be imposed.[80]

Fletcher, *supra* note 34, at 896. Such an approach may be fine for interpreting legislative intent, but when it is used for constitutional interpretation, the constitutional value being implemented becomes in effect a legislative and not a constitutional question.

77. *See generally* Allen, *supra* note 12; Allen, *supra* note 28; Jeffries & Stephan, *supra* note 12. Professor Dripps prefers to call these commentators "positivists," because "[t]hey believe that substantive liability rules are indistinguishable from procedural rules; both matter only to the extent that they may affect the material consequences for the parties." Dripps, *supra* note 29, at 1666 n.3.

78. *See generally* Allen, *supra* note 12, at 270-71; Jeffries & Stephan, *supra* note 12, at 1346-47.

79. Jeffries & Stephan, *supra* note 12, at 1365-66. Professor Allen casts the argument primarily in terms of the "greater-includes-the-lesser-rule," Allen, *supra* note 12, at 286-91, which basically holds that if a state can punish a behavior without including the disputed fact, the defendant cannot constitutionally complain if the fact is not proven beyond a reasonable doubt. Although the "greater-includes-lesser-rule" is of dubious constitutional validity, *see* Jeffries & Stephan, *supra* note 12, at 1337 n.28, the rule's basic premise essentially restates in doctrinal form the substantivist position that a fact must be constitutionally required before it need be subject to the reasonable doubt rule.

80. Professors Jeffries and Stephan would have the courts do so directly, identifying the constitutional elements of a crime. Jeffries & Stephan, *supra* note 12, at 1365-66; for discussion, see *infra* notes 89-94 and accompanying text. Professor Allen relies primarily on an eighth amendment disproportionality analysis. *See* Allen, *supra* note 12, at 297-300; Allen, *supra* note 28, at 47; for discussion, see *infra* notes 95-101. The ideas, however, are similar in

Two advantages of substantivism over proceduralism have been argued. First, the values of federalism and separation of powers are vindicated because the reasonable doubt rule as a constitutional requirement extends only to those facts constitutionally required for punishment. From the substantivist's perspective, proceduralism's flaw is that because the reasonable doubt rule is applied to facts that the state could elect to omit altogether if it so desired, the reasonable doubt rule unjustly penalizes the legislature for including more facts than are constitutionally necessary to define the crime.[81] The substantivist approach, in contrast, is consistent with federalism concerns because it limits the reasonable doubt rule to those facts mandated by the federal constitution.[82]

The second perceived advantage of substantivism is that, unlike expansive proceduralism, it gives legislatures flexibility to implement criminal law reforms.[83] Because the legislature will not have to attach the price tag of the reasonable doubt rule to every fact affecting guilt or punishment, they arguably will be more willing to experiment with new defenses and modify preexisting ones. Limiting the presumption of innocence to what is seen as its proper constitutional sphere, therefore, may lead in the long run to more progressive substantive criminal law.[84]

What is immediately striking about the substantive approach is the magnitude of its task. The substantivist's inquiry is a criminal theorist's dream, raising some of the most intriguing and perplexing questions of the criminal law. What excuses and justifications are fundamental to a concept of criminality? Duress? Self-defense, and, if so, what type? These types of questions, which have long lurked on the fringes of constitutional law, now would be looked at directly through the prism of the reasonable doubt rule.

Assuming the substantivist's constitutional view of the presumption of innocence is correct—a view disputed elsewhere[85]—the substantivist's approach poses significant problems. Foremost is the difficulty of developing a constitutional definition of guilt and innocence. Those advocating a substantivist approach generally admit that such a definition does

their search for the core constitutional facts that justify the criminal punishment imposed as the basis for the reasonable doubt rule.

81. *See supra* notes 50-51 and accompanying text.

82. Allen, *supra* note 12, at 295-301; Jeffries & Stephan, *supra* note 12, at 1365-66.

83. Restrictive proceduralism arguably provides similar flexibility, giving the legislatures even more leeway in controlling the burdens of proof. *See supra* notes 68-70 and accompanying text; *infra* notes 146-60 and accompanying text.

84. *See generally* Jeffries & Stephan, *supra* note 12, at 1353-56; *cf.* Patterson v. New York, 432 U.S. 197, 215 (1977) (concern over stifling legislative reform if the reasonable doubt rule applied too extensively).

85. *See infra* notes 125-45 and accompanying text.

not currently exist in any coherent or comprehensive form.[86] They suggest, however, that through the concepts of *mens rea, actus reus,* and proportionality of punishment, a "constitutional floor" of criminal guilt could be developed.[87] Upon further examination, such a vision proves both unrealistic and undesirable given the Supreme Court's reluctance in the area and the inadequacy of the tools to accomplish the feat.[88]

(1) The Court and Substantive Criminal Law

The Court's reluctance to impose constitutional controls on the procedures that states use in their criminal justice systems pales in comparison to its unwillingness to delineate constitutional principles of substantive law. The Court has repeatedly affirmed its deference to the states in defining the substantive criminal law and, as a result, has developed only the most cursory constitutional limits. If a substantive criminal law course were to be taught based on constitutional tenets identified by the Court, the class would be very short and the theory of criminal responsibility that emerged would be startlingly incomplete.

The Court has never even formally recognized *mens rea,* the most basic cornerstone of the criminal law, as having constitutional stature. Although the Court has commented on *mens rea*'s importance and read *mens rea* into congressional enactments as a matter of statutory interpretation,[89] it has also approved strict liability crimes that carried significant

86. Jeffries & Stephan, *supra* note 12, at 1366-70.

87. *Id.* at 1370-79; Allen, *supra* note 12, at 295-301; Allen, *supra* note 28, at 46-48 (advocating eighth amendment proportionality analysis).

88. In part out of a disbelief that *Patterson* could be so formalistic and arbitrary, the substantivists gained comfort from the majority's reference to constitutional limits on the states' power to define the elements of a crime. Generously read, *Patterson* held the possibility that the reasonable doubt rule was not procedurally based after all. *Cf.* Allen, *supra* note 28, at 49-53. Rather, an element of a crime had to be proven beyond a reasonable doubt not just because it was in the crime's formal definition (restrictive proceduralism), but because it was constitutionally required as part of the definition. *Id.*

Such an optimistic reading from a substantivist viewpoint seems untenable after *Martin.* In *Martin,* the majority made no effort to analyze the nature of self-defense or its abstract importance to culpability. Yet, self-defense was cited by the substantivists as a fact of such importance that a shifting of the burden of proof would at least engage the Court in a constitutional analysis. *See* Allen, *supra* note 28, at 52 n.80. *Martin* contains no such discussion and the opinion's strong deference to the states and legislature suggests a strong unwillingness to enter such a discussion; *see also* White v. Arn, 788 F.2d 338, 347 (6th Cir. 1986) (*Patterson* does not require Court to decide if self-defense is constitutionally required before allowing burden of proof to be placed on defendant).

89. *See, e.g.,* Liparota v. United States, 471 U.S. 419, 433 (1985) (reading *mens rea* into congressional statute); Morrisette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").

penalties.[90] Professor Packer's satirical assessment of the Court's treatment of *mens rea* thirty years ago has retained its truthfulness: "*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."[91]

Likewise, the Court has sketched a constitutional version of *actus reus* that does little more than provide that a state cannot punish mere status alone, like drug addiction,[92] and that an act cannot be the involuntary consequence of a condition that the individual is "utterly powerless" to change.[93] The doctrine of involuntariness as part of a constitutional view of criminal responsibility has completely stagnated. The few cases in the area have been relegated to isolated examples primarily dealing with the punishment of sociomedical problems like drug addiction and chronic alcoholism.[94]

Not surprisingly, given the Court's extremely limited views of *mens rea* and *actus reus,* the substantivists rely on the eighth amendment prohibition against disproportionate punishment as their constitutional catch-all.[95] The basic premise is that any legislative efforts to punish se-

90. *See, e.g.,* United States v. Freed, 401 U.S. 601, 607 (1971) (maximum penalty of ten years imprisonment and/or $10,000 fine); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910) (upholding statute making strict liability crime a felony with fine of up to $1,000 and/or imprisonment of up to two years). Although such cases have been severely criticized—Professor Packer has called *Shevlin-Carpenter* "an example of constitutional adjudication at its worst"—the Court has taken few steps in establishing substantive limits on strict liability offenses. *See generally* Packer, Mens Rea *and the Supreme Court,* 1962 SUP. CT. REV. 107, 111 (Court has not held *mens rea* required under Constitution); Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law and Due Process,* 24 WAYNE L. REV. 1571, 1592-615 (1978) (arguing strict criminal liability should be unconstitutional).

91. Packer, *supra* note 90, at 107.

92. Robinson v. California, 370 U.S. 660, 667 (1962) (statute making drug addiction a criminal offense is cruel and unusual). For discussion, see *infra* note 114.

93. Powell v. Texas, 392 U.S. 514, 567 (1968) (five Justices would invalidate defendant's conviction for public intoxication if he was "utterly powerless" to prevent act because of alcoholism). For discussion, see *infra* notes 112, 114.

94. Although *Robinson* and *Powell* frequently are cited for broad principles of proportionality, *see, e.g.,* Solem v. Helm, 463 U.S. 277, 286-90 (1983), they have resulted in few invalidations of criminal statutes on *actus reus* grounds. *See generally* J. DRESSLER, UNDERSTANDING CRIMINAL LAW 75-77 (1986) (noting unclear scope of *Powell* and *Robinson*); W. LAFAVE & A. SCOTT, CRIMINAL LAW 182-84 (2d ed. 1986) (same). *But see,* Goldman v. Knecht, 295 F. Supp. 897, 908 (D. Colo. 1969) (invalidating vagrancy statute as status crime). Somewhat ironically, *Powell* is most often cited not as standing for a constitutional doctrine of voluntariness, but for the proposition that no constitutional doctrine of *mens rea* exists. *See, e.g.,* Nelson v. Moriarty, 484 F.2d 1034, 1035 (1st Cir. 1973); Martin v. Blackburn, 521 F. Supp. 685, 718 (E.D. La. 1981); Rakes v. Coleman, 359 F. Supp. 370, 379 (E.D. Va. 1973).

95. Professor Allen in particular believes that eighth amendment disproportionality should guide the application of the reasonable doubt rule. Allen, *supra* note 28, at 46-48; *see also* Jeffries & Stephan, *supra* note 12, at 1376-79.

verely innocuous behavior or to shift radically the burden of proof to the defendant will be struck down as cruel and unusual punishment.

Again, apart from reviewing capital punishment cases, the Court has shown great deference to the states, hinting at one point that prison terms for felonies were beyond judicial review.[96] Although the Court later clarified that a sentence of years is reviewable as disproportionate,[97] such acknowledgment hardly has heralded a renaissance of eighth amendment disproportionality analysis.[98] Even those Justices supporting

96. In Rummel v. Estelle, 445 U.S. 263, 274 (1980), Justice Rehnquist wrote, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Rummel had received a life sentence upon his third conviction for a nonviolent property crime. *Id.* at 265-66.

97. In Solem v. Helm, 463 U.S. 277 (1983), the Court by a five to four margin applied the eighth amendment to a noncapital crime, overturning the petitioner's sentence of life imprisonment without parole after being convicted of his seventh nonviolent felony. The majority argued that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Id.* at 284. The *Helm* majority purported not to overrule *Rummel* despite its contrary language, *see supra* note 96, explaining:

> According to *Rummel v. Estelle, "one could argue* without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." [445 U.S. at 274] (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State—or the dissent . . . —makes this argument here, we find it meritless.

Helm, 463 U.S. at 288 n.14.

98. The courts have been extremely reluctant to reverse sentences as disproportionate and generally have read *Helm* as limited to the unique case in which life imprisonment without parole has been imposed for nonviolent offenses. *See, e.g.*, United States v. Rosenberg, 806 F.2d 1169, 1175 (3d Cir. 1986) ("apart from *Solem*'s particular factual context—a life-sentence without the possibility of parole—an abbreviated proportionality review following the *Solem* guidelines satisfies eighth amendment demands"); Holley v. Smith, 792 F.2d 1046, 1049 (11th Cir. 1986) ("The *Solem* case is limited by its narrow scope"); United States v. Rhodes, 779 F.2d 1019, 1028 (4th Cir. 1985) ("*Solem* requires an extensive proportionality analysis only in those cases involving life sentences without parole"); United States v. Darby, 744 F.2d 1508, 1525 (11th Cir. 1984) (review under *Helm* "greatly restricted"); Seritt v. Alabama, 731 F.2d 728, 732 (11th Cir. 1984) (*Helm*'s issue is "extremely narrow one of 'whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh *nonviolent felony*' ") (emphasis in circuit court's opinion); Moreno v. Estelle, 717 F.2d 171, 180 (5th Cir. 1983) (*Rummel* not *Helm* controls cases "not clearly distinguishable from . . . *Rummel* itself"). *But see* Marrero v. Dugger, 823 F.2d 1468, 1472 (11th Cir. 1987) (*Helm* applies to cases even where possibility of parole exists).

The courts' narrow readings are in part a result of the *Helm* majority's attempt to reconcile its holding with *Rummel* on the grounds that *Rummel* was factually distinguishable. *Helm*, 463 U.S. at 300-01. The major factual distinction was that Rummel was eligible for parole, while Helm's life sentence did not have a possibility of parole. Otherwise the cases were very similar, as both Rummel and Helm's crimes were nonviolent property crimes. Helm

a disproportionality analysis have emphasized that successful challenges will be rare and that great deference is owed to the legislature's judgment.[99] For example, a life sentence for a recidivist conviction based on three nonviolent property crimes totalling less than $230 has been held to satisfy eighth amendment proportionality requirements.[100] It is safe to predict that the eighth amendment's effectiveness in identifying minimums for constitutional culpability largely will be limited to nightmare scenarios in which the legislature has left any semblance of common sense behind or in which a statute led to an unforeseen harsh result.[101]

Moreover, these observations on the Court's unwillingness to delineate a constitutional definition of guilt and innocence are not answerable by saying, "whether or not the Court has undertaken or will engage in such an endeavor, the Court ought to develop such a definition." The substantivist's argument is not that a constitutional definition of criminal responsibility is desirable, but that the reasonable doubt rule—an existing constitutional right in criminal trials[102]—should be based on such a definition. Whatever the theoretical appeal of basing the reasonable doubt rule's constitutional scope on a constitutional definition of culpability, the theory is meaningless if the Court is either unwilling or unable to identify which facts are constitutionally required before criminal culpability can be assessed. In practice, legislatures and judges deciding where to place the burden of proof either would be faced with a game of constitutional hide-and-seek—guessing where the constitutional boundaries of criminal culpability lie—or would be given the freedom to place the burden of proof without any meaningful restraints.

Ironically, federalism may in the end prove to be substantivism's Achilles heel. Although substantivism in principle may be less intrusive on states' rights in mandating when the reasonable doubt rule applies,[103] in practice it would require the Court to delve into the substantive crimi-

actually committed more offenses, including three burglaries, leading Chief Justice Burger in his *Helm* dissent to call Rummel a "model citizen" compared to Helm. *Helm,* 463 U.S. at 304 (Burger, C.J., dissenting). *See generally* Terrebonne v. Butler, 43 Crim. L. Rep. 2289 (5th Cir. 1988) (en banc) (attempting to reconcile *Rummel* and *Helm* holdings on basis of difference in availability of parole).

99. *Helm,* 463 U.S. at 290 n.16 ("In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.").

100. These were the facts in *Rummel.* 445 U.S. at 265-66.

101. *See generally* Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen,* 94 HARV. L. REV. 1574, 1580-81 (1981) (arguing Court unlikely to adopt expansive disproportionality analysis).

102. *See supra* notes 5-8 and accompanying text.

103. *See supra* notes 81-82 and accompanying text.

nal law, an area of states' rights that the Court has treated as almost sacrosanct.[104]

(2) A Constitutional Definition of Guilt and Innocence: Is it Desirable?

What if, however, the Court had a change of heart and declared itself willing to identify directly what facts are constitutional facts for the reasonable doubt rule? Many law professors undoubtedly would embrace such a challenge as the academic equivalent of the search for the Holy Grail, looking for a unifying theory of criminal responsibility that explains the role of concepts like voluntariness, justification, and excuse. Would such an endeavor be a desirable development in the constitutional law area? Upon closer scrutiny, the substantivist's cure—constitutionally defining innocence—turns out to be worse than the perceived problem of extending the reasonable doubt rule to facts not within a constitutional definition of criminal responsibility.

As a preliminary observation, consider that despite centuries of effort, legislatures, courts, and commentators are still far from a consensus on what constitutes criminal behavior.[105] Even agreement on the purpose of the criminal justice system—retribution, deterrence, or rehabilitation—is lacking.[106] The substantivists would ask the Court not only to resolve such disagreements and devise a basic definition of criminal culpability, but to do so while operating under the restraints of constitutional interpretation.

The Court would have to address a number of factors that are frequently recognized as bearing on culpability. A cursory list might include *mens rea, actus reus,* involuntariness, insanity, duress, self-defense, mistake of fact, and necessity. Based on a majority's perception, the Court would then reveal which of these factors were constitutionally essential to determining whether criminal behavior had occurred. To use Justice Black's phrasing, "[the] Court . . . [would be] asked to set itself up

104. *See* Nesson, *supra* note 101, at 1581 (noting that even when Court has "ventured into substantive limitation theory it has quickly retreated").

105. Issues of disagreement range from what behavior should be subject to criminal sanctions, *see generally* Kadish, *The Crisis of Overcriminalization,* 374 ANNALS 157 (1967), to what standards of blameworthiness, if any, should be the basis of criminal punishment. *Compare, e.g.,* B. WOOTTON, CRIME AND THE CRIMINAL LAW 52-57 (1963) (arguing against a criminal law based on "blameworthiness") *with* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 149 (1947) (moral culpability is a central principle of criminal law) *with* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 36-40, 193-214 (1968) (disagreeing with both Professor Hall and Lady Wootton's conceptualizations of criminal law).

106. *See generally* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 67-73 (1981) (describing movement away from rehabilitation as goal of criminal justice system); J. DRESSLER, *supra* note 94, at 4-12 (comparing utilitarian and retributive theories of crime).

as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation . . . ."[107]

The enormity of the task is highlighted by the tools—*mens rea, actus reus,* and disproportionality—with which the Court has to work. These concepts are useful and desirable in patrolling for legislative abuses, but as a means of affirmatively setting out a constitutional theory of guilt and innocence, they are primitive and awkward. For example, *mens rea,* despite its revered status in the criminal law, falls far short of capturing the idea of culpability. *Mens rea* is a one-dimensional concept limited to describing intended cause and effect without accounting for why the individual acted.[108] *Mens rea* is often unable to distinguish culpable intentional behavior from excusable or justifiable intentional behavior.[109] Yet, why a person acted undoubtedly bears on even the most basic understanding of culpability.

107. Powell v. Texas, 392 U.S. 514, 547 (1968) (Black, J., concurring); *see also* L. HAND, THE BILL OF RIGHTS 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not").

108. Although at one time *mens rea* may have represented a broad idea of moral blameworthiness, its modern definition now narrowly focuses on the mental state specified by the crime's definition. *See generally* J. DRESSLER, *supra* note 94, at 96-97 (discussing broad and narrow meanings of *mens rea*). The idea of *mens rea* as an expression of culpability works best when the fact pattern is unadorned of any defense or excuse. For example, in deciding whether someone is guilty of criminal homicide, *mens rea* usually works fine for discerning culpability in distinguishing the intentional or extremely careless killer from the individual who kills accidentally and without fault.

Even in these simple fact pattern cases, however, *mens rea* may fall short of defining the culpable behavior if directed at the wrong objective. For example, in Liparota v. United States, 471 U.S. 419, 426 (1985), although the statute prohibited "knowingly" using food stamps in an unauthorized manner, the effect was one of a strict liability crime because unauthorized uses included a "broad range of apparently innocent conduct." As a result, the majority read the statute as also requiring that one knew that the prohibited act was illegal. *Id.* at 433. *Liparota* illustrates that merely including an "intent" element does not necessarily resolve the problem of punishing only culpable individuals.

109. In a homicide case, for example, *mens rea* may be limited to asking whether the killing was intentional. That the individual killed because she honestly and reasonably feared immediate serious bodily harm is outside the bounds of the *mens rea* question. Yet, in a discussion of criminal culpability, self-defense would unquestionably excuse her from criminal responsibility.

The possibility of *mens rea* and culpability bypassing each other is easily seen in *Martin.* In *Martin,* Ohio defined the *mens rea* elaborately, even making it a "specific intent" crime of a purposeful killing with prior calculation or design. *See* OHIO REV. CODE ANN. § 2903.01 (Anderson 1982). Yet, many who are undeniably not culpable, such as the police officer who kills in the course of duty or the individual acting in justifiable self-defense, satisfy the *mens rea* requirement because they killed purposely and with prior design. *Mens rea*'s inability to distinguish between culpable intentional behavior and excusable or justifiable intentional behavior allowed the *Martin* majority to characterize self-defense as a claim separate and apart from the *mens rea* element of murder under Ohio law. Martin v. Ohio, 480 U.S. 228, 233 (1987).

At a minimum, the above discussion suggests that recognizing *mens rea* as a constitu-

Likewise, the concept of *actus reus* adds only a very small part to a theory of culpability. The most promising aspect of a constitutional requirement of *actus reus* lies in the notion of voluntariness. Most simply stated, the principle maintains that even if the physical act of a crime occurs, criminal responsibility is relieved if the defendant did not do the act voluntarily.[110] For example, the defendant who hits an individual because of a reflex action is not guilty of battery even though the act of a physical blow has in fact occurred.

The notion of voluntariness, however, has not been extended very far. The common law viewed voluntariness very narrowly, limiting the focus to whether an individual consciously chose, for whatever reason, to cause the act.[111] The potential scope of such a definition is obviously very limited: defendants who act while sleepwalking or while unconscious do not constitute a large percentage of the criminal docket. Similarly, the Court strictly has limited any constitutional doctrine of voluntariness to conditions over which the defendant is "utterly powerless" and has "no capacity to change or avoid."[112] As noted earlier,[113] this version of voluntariness basically has been confined to the narrow

tional doctrine falls far short of creating a theory of culpability. *Mens rea* is an important concept to criminal liability, but does not extend to more complex cases of criminal responsibility that go beyond simple questions of intentional cause and effect. If the substantivist's goal is to identify a constitutional theory of culpability to which the reasonable doubt rule applies, other constitutional "facts" must be added to accommodate the more sophisticated problems of culpability that arise.

110. *See generally* W. LAFAVE & A. SCOTT, *supra* note 94, at 197-98 ("act" is willed movement).

111. *See* O.W. HOLMES, THE COMMON LAW 54 (1881) ("The contraction of the muscles must be willed."). Ohio, for example, specifies which acts are involuntary: "[r]eflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts." OHIO REV. CODE ANN. § 2901.21(c) (1973). *See generally* J. DRESSLER, *supra* note 94, at 66-67 (discussing uses of term "voluntary" with respect to acts); W. LAFAVE & A. SCOTT, *supra* note 94, at 198-99 (discussing arbitrary nature of term "voluntary").

112. Powell v. Texas, 392 U.S. 514, 566 (Fortas, J., dissenting). The more expansive possibilities lie with a definition of involuntariness that incorporates notions of free choice. If *actus reus* is absent in a constitutional sense because an individual's situation precluded the opportunity to make a reasoned choice to avoid the act, then a number of defenses become potential constitutional facts. Defendants who act out of duress, necessity, or insanity can argue that their acts were involuntary because they lacked either the capacity or the chance to choose a lawful alternative. A definition of psychological involuntariness could provide the Court the forum for examining what defenses are so basic to ideas of moral blameworthiness that they are essential to a constitutional definition of guilt. *See generally* G. FLETCHER, RETHINKING CRIMINAL LAW 803 (1978) (distinguishing between physical and normative involuntariness); for discussion of *Powell,* see *infra* note 114.

113. *See supra* notes 92-94 and accompanying text.

realm of sociomedical conditions like drug addiction and chronic alcoholism.[114]

If left with *mens rea* and *actus reus* as the means for defining constitutional concepts of guilt and innocence, a rather incomplete and crude picture of responsibility emerges: a crime must include an act or result that was voluntarily brought about and was intended to happen. Missing is any accounting for why the individual did the act, a factor beyond the pale of *mens rea* and *actus reus.* As a result, the burden of filling in the missing parts of a constitutional definition of guilt and innocence is left to eighth amendment disproportionality analysis.[115]

Disproportionality analysis, however, is the concept least suited for developing a definition of culpable behavior. Whatever their flaws, *actus reus* and *mens rea* are concrete concepts that can be identified and used

114. The Court at one time indicated that it might develop a broader doctrine of voluntariness through the eighth amendment. In Robinson v. California, 370 U.S. 660, 676 (1962), the Court found unconstitutional a statute criminalizing drug addiction, requiring an act by an individual beyond mere status. The question after *Robinson* was how broadly would a constitutional requirement of an act extend. The Court's answer in Powell v. Texas, 392 U.S. 514 (1968), was heavy on promise but light on constitutional impact.

In *Powell,* the petitioner argued that because he was a chronic alcoholic, his conviction for public intoxication was punishing an involuntary result of his condition and therefore constituted cruel and unusual punishment. *Id.* at 521. A majority of the Court denied his claim, but five Justices accepted the idea that Powell's involuntariness argument was constitutionally colorable. The four dissenters found Powell's constitutional claim to be legitimate, *id.* at 566-70 (Fortas, J., dissenting), and a fifth Justice—Justice White—agreed with the viability of the petitioner's voluntariness argument, but found Powell had failed to show his public intoxication was an involuntary consequence of his alcoholism. *Id.* at 548-54 (White, J., concurring).

Extrapolated to its logical ends, *Powell* could be seen as recognizing a doctrine that an act must be voluntary before it can be punished constitutionally. Those Justices arguing against recognizing Powell's involuntariness claim raised such slippery slope concerns: "The real reach of any such decision would be . . . the basic premise . . . that it is cruel and unusual to punish a person who is not morally blameworthy." *Id.* at 544 (Black, J., concurring). Indeed, Justice Marshall writing for the plurality feared that *Powell* would lead precisely to what the substantivist is arguing for: "a constitutional doctrine of criminal responsibility." *Id.* at 534.

After two decades, any revolutionary impact in the form of an expansive constitutional doctrine of voluntariness has yet to materialize. Such a limited effect may be attributable in part to how narrowly Justice Fortas wrote the opinion recognizing involuntariness as a constitutional claim. He stressed that the petitioner's argument was limited to a "condition," and the opinion is laden with absolutes: "powerless to change," "utterly powerless," "no capacity to change or avoid." *Id.* at 567-68. More specifically, the opinion was limited to the rather special circumstances of chronic alcoholism and the "uncontrollable compulsion" that it produced to drink. *Id.* at 568. *Powell* simply has not become the means for mapping the substantivist's constitutional doctrine of criminal responsibility. *See supra* note 94. *But cf.* Watson v. United States, 439 F.2d 442, 459 (D.C. Cir. 1970) (Bazelon, J., concurring in part and dissenting in part) ("*Powell* should be read . . . as an exhortation toward further experiment with common-law doctrines of criminal responsibility.").

115. Professor Allen would premise the reasonable doubt rule entirely on the eighth amendment inquiry. *See supra* note 95.

by the legislature in defining a particular crime. Disproportionality analysis, on the other hand, is a reaction to the combination of factors used in legislative schemes and acts as a safety net for catching grossly disproportionate schemes.[116] The eighth amendment approximates more of an "I know it when I see it" standard than a means of prescribing affirmative rules applicable to future cases.[117] Using disproportionality analysis to fill in the missing pieces of the substantivist's constitutional definition of culpability would be a cumbersome, drawn-out, and confusing process.

The substantivist's answer may be that the Court is not being asked to write a criminal code, but only to identify those facts so crucial to criminal culpability that they are constitutionally required. The task, however, is not so simple or easily contained. Because disproportionality rulings tend to be fact specific, drawing broad conclusions on when a fact is constitutionally required is very difficult. For example, the Court might recognize that self-defense is so accepted as an exonerating circumstance that its absence is essential to proving criminal homicide.[118] The inquiry, however, could not end there. Statutory variations inevitably would require elaboration on a constitutional definition of self-defense: for example, must the belief that force is necessary be objectively reasonable?[119] Because almost all of the excuses and justifications cur-

116. In Solem v. Helm, 463 U.S. 277, 292 (1983), the majority outlined a three-prong test that looks at "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." This test is basically the same as the one developed by the Fourth Circuit in Hart v. Coiner, 483 F.2d 136, 140-43 (4th Cir.), *cert. denied,* 415 U.S. 938 (1974), and used by lower federal courts prior to *Rummel. See, e.g.,* Brown v. Parratt, 419 F. Supp. 44, 46 (D. Neb. 1977); Roberts v. Collins, 404 F. Supp. 119, 122-23 (D. Md. 1975).

117. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring) (in describing the difficulty of defining obscenity, Justice Stewart remarked, "[P]erhaps I could never succeed in intelligibly [defining obscenity,] but I know it when I see it . . . .").

118. Presumably such a ruling would result if a legislature abolished self-defense or, perhaps, greatly restricted its operation.

119. American jurisdictions vary as to whether an objective or subjective standard of reasonableness is used in judging the defendant's belief that deadly force was necessary. *See* Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill,* 36 AM. U.L. REV. 11, 31-32 (1986). Once the Court told a state it must include self-defense, then the debate would be opened to which type of reasonableness standard was appropriate. If the Court said only an objectively reasonable belief must be recognized, the focus turns to the state that has adopted a subjective reasonableness standard. Must the state prove the absence of self-defense even though it is exceeding the constitutional minima? If so, then the state is being required to prove beyond a reasonable doubt facts that are not constitutionally required (*i.e.,* that the defendant's belief was not subjectively reasonable). But if the state is relieved of the burden of proof, then the state is given the choice of avoiding the reasonable doubt rule by providing a broader defense than constitutionally required. An intermediate

rently used have a number of variations,[120] it is difficult to see how the Court could avoid becoming embroiled in deciding what constitutes the constitutional minimum for different factors.[121]

Equally troubling is whether and how a body of law for guiding the reasonable doubt rule based on an eighth amendment analysis would develop. The best case for deciding whether a fact is constitutionally required by the amendment would be one in which the legislature went to the extreme of abolishing the factor altogether. Such cases, however, will be rare and would leave the law governing the reasonable doubt rule to the haphazard and uncertain prospects of states eliminating defenses like insanity and self-defense. For a meaningful body of law to emerge, therefore, the Court would have to agree to hear cases in which the fact was still part of the legislative scheme, but the defendant bore the burden of proof. Given the Court's general reluctance to use eighth amendment disproportionality analysis, it seems unlikely that the Court would reach out to decide whether the eighth amendment requires a factor for criminal culpability when the factor still exists in some form.

The above arguments are not meant to suggest that questions of criminal culpability are always beyond the Constitution's scope. Certainly if a state were to eliminate the defense of insanity or to bar a defendant from claiming self-defense, the Court would be obliged to determine whether such acts violated due process and eighth amendment

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solution of letting the state shift the burden on "constitutionally optional" facts has been dismissed as a "cumbersome approach that could not realistically be implemented." S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 81 n.50 (4th ed. 1983).

120. *See generally* W. LAFAVE & A. SCOTT, *supra* note 94, at 457-61 (self-defense), 304-32 (insanity), 437-41 (duress), 445-50 (necessity).

121. For similar reasons, the *Powell* plurality argued against recognizing the petitioner's eighth amendment claim based on involuntariness. Justice Marshall believed that to accept the argument would draw the Court into deciding a constitutional definition of insanity:

> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of Robinson to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," . . . would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e.g.*, the right-wrong test of M'Naghten's Case. But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

392 U.S. 514, 536-37 (1968). Similar concerns would adhere to attempts at defining other defenses, which must be adapted to meet changing conditions and beliefs. *See, e.g.*, Rosen, *supra* note 119 (discussing policy conflicts over battered woman's defense).

protections. To ask the Court to decide such matters as a means of formulating a constitutional definition of innocence, however, means the task either will be poorly done or will become overwhelming. Asking the Court to catch abuses is reasonable, but it is quite a different request to ask the Court to piece together a theory of culpability based on the complex interaction of a variety of factors.[122]

II. Rethinking Innocence and the Reasonable Doubt Rule

Mullaney and *Patterson* sparked a vigorous debate over the reasonable doubt rule's constitutional role. The opinions' broader implications were explored, and different approaches began to develop. Yet, the actual fact in issue in *Mullaney* and *Patterson*—heat of passion—offered a relatively narrow focus: the defendants already were guilty of a criminal homicide, leaving only the question of what degree of homicide was appropriate. In *Martin,* on the other hand, an erroneous finding that the defendant did not act in self-defense meant the punishment of someone who should not have been subject to criminal punishment at all. Although the result in *Martin* does not represent a change from the Court's reasoning in *Patterson,* it does highlight the consequences of the Court's embracing of restrictive proceduralism: an individual is now serving a sentence for murder even though it may be as likely as not that she acted in a "justif[iable]" and "blameless" fashion.[123]

The *Martin* decision calls for a reexamination of the presumption of innocence and the reasonable doubt rule to decide whether the Court's current approach is either desirable or necessary.[124] This Article under-

122. Justice Marshall's plurality opinion in *Powell* nicely summarized the fluidity and complexity of the law:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

392 U.S. at 535-36.

123. The descriptive words are from the *Martin* majority's opinion. Martin v. Ohio, 480 U.S. 228, 234 (1987).

124. Given the various policy considerations involved, the inquiry is perhaps more properly phrased in terms of what is the "best approach" to resolving the competing interests. *Cf.* Ashworth, *Concepts of Criminal Justice,* 1979 CRIM. L.R. 412, 418:

> In arguments about defects and proposed changes in the system . . . the term [justice] is often found in an evaluative sense—as in "justice demands . . ." and "in the interests of justice." Does the term have any settled meaning, when used in this evalua-

takes the reexamination by expressly addressing the underlying principles of substantivism, restrictive proceduralism, and expansive proceduralism. After such an analysis, the conclusion is reached that only expansive proceduralism as given voice in *Mullaney* adequately protects the role of the presumption of innocence in the criminal trial: the government should be required to prove beyond a reasonable doubt every fact that bears on the individual's guilt and punishment under the legislative scheme.

A. Finding the Protected Interests: A Response to Substantivism

To speak of innocence as part of the presumption of innocence is to refer to an outcome, a result, with which the criminal justice system is concerned. The question should not be an abstract what is innocence, but what is the outcome being guarded against by relying upon the presumption of innocence. Innocence, in other words, must be defined as a function of the presumption of innocence and derived from the specific context—the criminal trial—in which the presumption of innocence and the reasonable doubt rule operate. In short, innocence represents the interests at stake in a criminal trial which, as a result of the presumption of innocence, can be taken away only after every reasonable doubt has been given to the defendant.

What are those interests? If the focus is on the function of the reasonable doubt rule, the answer inevitably centers on the jury verdict of guilty or not guilty. It is the jury deliberation process to which the presumption of innocence and the reasonable doubt rule are concretely applied and through which the presumption of innocence traditionally has manifested itself.[125] The inquiry, therefore, is further narrowed to identifying what interests are bound up in a jury verdict in a criminal trial that explain why the presumption of innocence exists and what its constitutional scope should be.

The first logical possibility is to focus broadly on whether sufficient acts have been proven that could justify the loss of physical liberty at-

tive sense? It can be powerfully argued that it does not: the precise balance struck between crime control and the various qualifying considerations is a matter for each society at each stage in its history, not a matter which can be determined by absolutes or by abstract reasoning, and the invocation of "justice" in support of a particular argument serves merely to draw attention to what the speaker regards as an imbalance.

125. The presumption of innocence, of course, has other manifestations such as the right not to testify. *Cf.* Griffin v. California, 380 U.S. 609, 611 (1965) (privilege against self-incrimination bans prosecutorial comment on constitutional right to testify). The reasonable doubt rule, however, is the procedure most directly oriented at guiding the jury deliberation process.

tendant to a criminal conviction. This focus on the right to punish as the core of the presumption of innocence is the essence of the substantivist's position: no constitutional justification exists for extending the reasonable doubt rule to facts that are not constitutionally required for the punishment which the defendant received.[126] Or, stated in eighth amendment disproportionality terms, if the conduct that has been proven beyond a reasonable doubt can constitutionally justify the punishment imposed, the defendant has suffered no actual harm even if the jury erroneously finds other facts to be true using a lower standard of proof.[127] This "no harm, no foul" argument reflects in part the basic idea that a remedy (the reasonable doubt rule) should be no broader than the constitutional wrong (erroneous convictions and disproportionate punishment).[128]

The problem with a definition of innocence that primarily focuses upon a theoretical right to punish is that it ignores how the right to punish arises in the actual criminal trial. When a jury retires to the jury room to deliberate, it is not simply told to determine whether the defendant should be punished, but whether the facts support a finding that the defendant violated the criminal laws. The jury derives its power to pronounce the defendant guilty and to punish the defendant from the criminal law as defined by the legislature. A jury could not constitutionally find a defendant guilty of a crime if the facts did not meet the legislative definition, even if the jury members independently believed some punishment was justified.[129]

Because the guilty verdict is based on a legislatively defined criminal law, an interest arises that implicates the presumption of innocence beyond the right to punish. The focus is now on what the criminal law, and a finding that it has been violated, represents. In a democratic system, the answer is that the criminal law represents that behavior which society

126. *See supra* notes 81-82 and accompanying text.

127. *See supra* note 95 and accompanying text.

128. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.").

129. Juries undoubtedly bring their own values into play in evaluating the facts and arriving at a verdict. *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 494-96 (1966) (concluding juries "legislate interstitially"). Their authority, however, derives from the legislature's definition, and they cannot convict when a reasonable jury could not find all elements of crime were proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315 (1979) (*Winship* requires federal courts to assess sufficiency of evidence at state trial by reasonable doubt standard); Dripps, *supra* note 29, at 1680-83 (discussing due process "legality principle"). Jury nullification, however, may allow a jury to acquit even if the prosecution has proven all elements beyond a reasonable doubt. *See generally* United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (discussing history and role of jury nullification).

through its elected representatives has determined so violates societal norms that it should be condemned and punished as criminal.[130] The societal judgment may vary with the times, sometimes being lenient and other times more strict, but the criminal code is the vehicle through which the judgment is expressed. Consequently, when a jury returns a guilty verdict, it is saying that it has found that the defendant violated societal norms of conduct as defined by the legislature.[131]

If one adopts this view of what is at stake with the criminal verdict, then a constitutional harm occurs even when the state could have punished the behavior that was proven beyond a reasonable doubt, but has chosen to use a broader definition of what constitutes criminal behavior. The liberty interest at stake with the criminal conviction precedes the question of punishment and centers on the legitimacy of the jury's finding of guilt, which derives from the accuracy of its determination that the criminal law was violated. A verdict of guilty, in other words, is not simply an administrative decision to lock the defendant up, but a factual finding that an individual engaged in behavior that society—through the legislature—has decided is neither justifiable nor excusable.[132] Guilt and innocence judgments go beyond the mere question of whether criminal punishment abstractly could be justified to issues of whether society has decided the act in fact should be treated as criminal; the decision is the legislature's to make, and it is free to decide how far beyond the constitutional minimum it wishes to proceed.[133]

If the jury's guilt-innocence determination is more than merely a decision to incarcerate, to extend the presumption of innocence solely to those facts which *could* justify punishment is protecting only part of an individual's liberty interest against erroneous conviction. As an example,

130. *See generally* Jeffries, *Legality, Vagueness and the Construction of Penal Statutes,* 71 VA. L. REV. 189, 190 (1985). Common-law crimes—that is, judge made law—arguably are an exception to this general proposition. The trend, however, is either to abolish common-law crimes or to legislatively incorporate them into the penal code. *See* J. DRESSLER, *supra* note 94, at 14-16; W. LAFAVE & A. SCOTT, *supra* note 94, at 66.

131. A jury, however, may "temper" a finding that the defendant violated the law by acquitting: "[S]ince if [the jurors] acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942) (Hand, J.).

132. The terms "justifiable" and "excusable," in keeping with the idea of a functional definition of innocence, are meant simply as situations that the legislature has recognized as relieving the individual of criminal responsibility. As theories, justification and excuse may have important distinctions. *See generally* Greenawalt, *The Perplexing Borders of Justification and Excuse,* 84 COLUM. L. REV. 1897 (1984).

133. This assumes, of course, that such a constitutional minimum can be identified. *See supra* notes 89-104 and accompanying text.

a legislature may decide that its constituency now believes that possession of small amounts of marijuana for personal use should not be punished criminally. As a result, the legislature might enact a "personal use defense" providing for acquittal on possession charges if the defendant possessed only enough marijuana for his personal consumption.[134] The defense is one that the legislature clearly need not recognize, but has decided to adopt because it believes the behavior does not constitute a criminal act. The purpose of possession—whether for sale or for personal use—serves as the dividing line for condemning an individual's acts. To argue that the presumption of innocence does not extend to a finding that the defendant's possession was not for personal use would be to ignore that society has chosen not to condemn such behavior as criminal even though it legitimately could do so.[135]

The argument that the presumption of innocence extends beyond constitutional prerequisites for assessing criminal liability is in line with traditional due process principles that a state can create a protected interest through its actions.[136] If the focus is on the criminal law as the source of the jury's power to render a judgment against an individual, the writing of the penal code itself is a process of stating that one's liberty interest shall not be taken away unless certain levels of criminal responsibility are found. Consequently, when a legislature elects to proceed beyond the constitutional minima in defining criminal conduct, those additional facts become bound up in the liberty interest of being free from erroneous condemnation and punishment.

134. *Cf.* ALASKA STAT. § 17.12.100(e) (1975) (public possession of one ounce or less of marijuana or private possession of any amount for personal use punishable by civil fine not to exceed $100); ME. REV. STAT. ANN. tit. 22, § 2383 (1980) (possession of usable amount of marijuana is civil violation punishable by fine not to exceed $200).

135. The reply might be proffered that to allow the release of an individual on an erroneous finding that the defendant's possession was for personal use ignores that society has chosen to declare possession for other purposes to be criminal. Such an argument is really directed at what risk of an erroneous acquittal the presumption of innocence should allow, and not whether such a factor should be subject to the presumption of innocence in the first place. The crucial point in responding to the substantivists is that such legislatively recognized factors should be included within a definition of innocence in the first place. For a discussion of altering the risk of erroneous acquittal through the burden of proof, see *infra* notes 146-60 and accompanying text.

136. *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 401 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); Morrissey v. Brewer, 408 U.S. 471, 481-84 (1971) (discretion in parole policies does not relieve state of due process requirements); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (despite state choice over welfare programs, such programs must accord with due process).

Perhaps the primary difficulty with accepting the proposed functional definition of innocence is that certain defenses that exonerate the defendant or reduce his culpability are not necessarily in harmony with abstract notions of culpability and innocence. Many individuals would accept the proposition that a defendant who was entrapped or who acted under an insane delusion was still culpable on some level in a way that an individual who accidentally caused a forbidden result is not. The defendant may be relieved from criminal liability because of entrapment or insanity, but his or her behavior does not deserve the stamp of approval that many might associate with calling an action innocent.[137] Such an intuitive distinction no doubt explains the Court's reasoning in *Leland v. Oregon*[138] that insanity was an "issue set apart from the crime charged" even though a jury finding of insanity would acquit the defendant.

137. Entrapment is an especially troubled doctrine, lacking an agreed upon rationale. *See generally* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma,* 1981 SUP. CT. REV. 111. The doctrine can be seen either as a public policy decision or as a factor bearing on culpability. Robinson, *Criminal Law Defenses: A Systematic Analysis,* 82 COLUM. L. REV. 199, 236-39 (1982).

138. 343 U.S. 790, 795-96 (1952) (upholding requirement that defendant prove insanity beyond a reasonable doubt). The *Leland* majority's view of insanity as an issue "apart" was a precursor of the Court's ultimate refusal to adopt a holistic view of criminal responsibility. In a case preceding *Leland,* a unanimous Court had viewed insanity as bound up in the question of criminal responsibility:

> If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of "guilty as charged" is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible criminally for his acts. How, then, upon principle, or consistently with humanity, can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?

Davis v. United States, 160 U.S. 469, 488 (1895) (adopting reasonable doubt rule for federal defense of insanity). *Leland* distinguished *Davis* as establishing a federal rule but not a constitutional doctrine. 343 U.S. at 797. The *Leland* majority did not explain, however, why *Davis*' view of insanity's role in establishing guilt was no longer valid and insanity was now an issue "apart." *See also id.* at 804 (Frankfurter, J., dissenting) (insanity is issue of culpability).

The difficulty of separating defenses from the question of guilt is also evidenced by the potential confusion generated when the jury is instructed that the government must prove the *mens rea* beyond a reasonable doubt, but the defendant bears the burden of proof for the defense. In both *Martin* (self-defense) and *Leland* (insanity), the majority was faced with the issue of whether the burden of proof instruction on the defense confused the jury as to who had

Innocence for the presumption of innocence, however, is not an abstract term of culpability; it is a concept applied to the specific context of a jury at trial determining if the defendant violated the criminal law. It may be helpful to think of innocence in this context as more of a question of criminal responsibility than an issue of culpability.[139] The term responsibility perhaps better reflects the idea that once the focus is on the criminal trial, the issue is no longer one of abstract moral right and wrong, but specifically whether society views the individual as responsible for violating the criminal law.

Degrees of culpability are appropriate issues for the legislature in formulating the criminal law, but once at trial the issue of criminal responsibility becomes an all-or-nothing issue: the jury's fact-finding will determine either that the defendant violated the criminal law or that he did not.[140] The jury decision simply does not leave room for halfway culpability determinations. A defendant who is found guilty because he bore the burden of proof but in fact was legally insane will not be found "guilty but less culpable because a reasonable doubt might have existed as to his sanity." The defendant will be found guilty and held criminally responsible. Legislative hedging by denying the factor's availability to certain individuals based on levels of proof is not the proper response to residual doubts about whether a particular defense should absolve a defendant of criminal responsibility.[141]

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the burden of persuasion for the *mens rea.* Martin v. Ohio, 480 U.S. 228, 234 (1987); *Leland,* 343 U.S. at 800.

139. The difference in terms is proposed solely as a semantic device to help clarify the premise. No profound philosophical distinctions are intended (but certainly are welcomed). *Cf.* Booth v. Maryland, 107 S. Ct. 2529, 2541-42 (1987) (Scalia, J., dissenting) (distinguishing between moral guilt and personal responsibility).

140. The argument is similar to Justice Frankfurter's view in his *Leland* dissent:

> The tests by which such culpability may be determined are varying and conflicting.... At this stage of scientific knowledge it would be indefensible to impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test, no matter how backward it may be in the light of the best scientific canons. Inevitably, the legal tests for determining the mental state on which criminal culpability is to be based are in strong conflict in our forty-eight States. *But when a State has chosen its theory for testing culpability, it is a deprivation of life without due process to send a man to his doom if he cannot prove beyond a reasonable doubt that the physical events of homicide did not constitute murder because under the State's theory he was incapable of acting culpably.*

343 U.S. at 803-04 (Frankfurter, J., dissenting) (emphasis added).

141. For ways of confronting such legislative doubts that accord with the presumption of innocence, see *infra* notes 161-76 and accompanying text.

The irony of the substantivist's claim of better protecting federalism is that basing the definition of innocence on an overarching constitutional theory of culpability discounts one of the states' greatest rights under federalism: the ability to define criminal standards in accord with the beliefs of its citizenry.[142] When a jury is convened it becomes the means of carrying out the particular community's judgment of what currently merits criminal sanctions. It is this dynamic, changing nature of the criminal law, democracy and federalism at their foremost, for which a static view of innocence fails to account. The reality of a criminal justice system implementing a state's criminal law is different from judicial and scholarly notions of what should constitute criminal culpability.[143] The presumption of innocence is concerned with criminal law in the trenches—a finding at trial that one violated the criminal law—and not with questions of what should be the law.

In the end, the weakness of substantivism is its failure to recognize that the presumption of innocence is not an abstract legal question of when punishment is theoretically permissible. Rather the doctrine, as expressed through the reasonable doubt rule, developed within the very specific context of ensuring against erroneous jury verdicts of guilty.[144]

142. As Justice Black observed, "The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. The criminal law is a social tool that is employed in seeking a wide variety of goals . . . ." Powell v. Texas, 392 U.S. 514, 545 (1968) (Black, J., concurring).

Justice Black, however, also realized that the right of the states to define criminal behavior was distinct from the issue of what the Constitution required in proving the behavior occurred. *See Leland,* 343 U.S. at 804 (Justice Black joining Justice Frankfurter's dissenting view that "when a State has chosen its theory for testing culpability, it is a deprivation of life without due process to send a man to his doom if he cannot prove beyond a reasonable doubt that the physical events of homicide did not constitute murder because under the State's theory he was incapable of acting culpably.").

143. *Cf.* Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process,* 79 YALE L.J. 359, 416 n.189 (1970):

> The irrelevance of the constitutional law of criminal procedure to the circumstances of the ordinary defendant is particularly acute because no sustained effort to enforce it has been made. It seems to me that much popular and academic discussion of the Supreme Court's decisions in the criminal procedure field has suffered from an inability to focus on what actually was going on. Both critics and supporters attach great importance to the "rules" laid down by the Court. . . . Almost no one has concerned himself with the actual *significance* of those rules in the life of concrete defendants. The Court, least of all, has confronted the problem of making its abstractions effective, but while it has been criticized for many things this most central failing has hardly been noticed at all.

144. The proposed approach to defining innocence also explains why the reasonable doubt rule is not limited by historical practices that placed the burden of proof on the defendant for certain defenses. *See* Allen, *supra* note 28, at 39-40. If the concept of what is protected—"innocence"—has expanded, then the scope of the presumption of innocence and reasonable doubt rule may also expand consistent with historical purpose (if not practice). The trend has

The meaning of innocence must be derived from what is represented by the facts the jury is told to determine in reaching a verdict. Once innocence is viewed as a functional concept, put into the trenches, the constitutional right being protected becomes the freedom from a wrongful determination that one has violated society's values as defined by the legislature.[145] The substantivist's argument in essence reverses logic: the right to punish is the consequence of a guilt determination based on societal norms, not a way of defining guilt and innocence itself.

B. An Independent Constitutional Role for the Reasonable Doubt Rule

(1) Responding to Restrictive Proceduralism

The above critique of substantivism emphasizes the criminal law as an expression of societal judgment. The guilt-innocence determination for the presumption of innocence is seen not as a matter of whether the constitutional right to punish exists, but as a manifestation of society's

been toward a recognition of criminal liability based upon all factors the legislature has identified as bearing on criminal responsibility. *See* Fletcher, *supra* note 34, at 910-35; *cf.* A. CROSS, *supra* note 1, at 13 (placing burden of proof on defendant for insanity is "historical anomaly"); G. WILLIAMS, *supra* note 16, at 152 (defenses placing burden of proof on defendant are cases in which the burden of proving his innocence is cast on the accused).

145. The temptation is to proceed further and more specifically describe the values at stake with the presumption of innocence. For example, commentators and courts have spoken in terms of stigma, rationality, public understanding of the criminal law, and utilitarianism. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (stigma); *In re* Winship, 397 U.S. 358, 363-64 (1970) (stigma and loss of reputation); Dripps, *supra* note 29, at 1685 ("legality" principle is utilitarian idea barring needless punishment); Nesson, *supra* note 101, at 1582-84 (rationality); Saltzburg, *supra* note 29, at 405 (stigma); Underwood, *supra* note 17, at 1323-24 (burdens of proof may give public "a false idea of the law"). All of these efforts are admirable attempts to describe why the presumption of innocence is important. But, at bottom, they remain primarily descriptive and vulnerable to the charge that they are not constitutionally recognized values or are beyond the government's control. *See, e.g.*, Allen, *supra* note 12, at 282-83 (protection from stigma too indefinite to be constitutionally protected value). Professor Dripps perhaps comes closest in identifying a concrete constitutional value by focusing on a due process based legality principle that the government must follow its own law before punishing a person for a crime. Dripps, *supra* note 29, at 1680.

The proposed justification, in contrast, views the question more simplistically: if the presumption of innocence is an accepted constitutional value aimed at preventing erroneous convictions of innocent individuals (*Winship*), what is innocence? The focus then centers on the criminal trial and what innocence means in the context of what the jury is deciding. The approach is less a search for constitutional theory than an attempt to give the presumption of innocence meaning based on what a criminal conviction means to the individual subjected to criminal prosecution and punishment. *Cf.* Getman, *Colloquy: Human Voice in Legal Discourse*, 66 TEX. L. REV. 577, 584-85 (1988) (discussing "rigorous legal analysis" that led to conclusion *Brown v. Board of Education* was wrongly decided and that separate but equal doctrine was constitutionally acceptable). Likewise, the approach attempts to deal with legitimate societal concerns over acquittal of the guilty by focusing on the trial process itself. *See infra* notes 161-76 and accompanying text.

judgment that it should condemn and punish the behavior. The question then becomes whether by emphasizing the legislature's role in crafting the penal code as an embodiment of societal norms, restrictive proceduralism represents the best approach. Restrictive proceduralism, after all, stresses deference to the legislature in formulating criminal law and procedure.[146]

The restrictive proceduralist's approach has great appeal when the presumption of innocence is stated as a balancing of two corresponding injustices: the conviction of the innocent and the acquittal of the guilty. Why not let the state weigh the risk for a particular factor and, by calling a factor an element or a defense, calibrate the acceptable amount of risk? The presumption of innocence essentially would be turned into a sliding scale with the legislature controlling how much innocence would be presumed for a particular fact. The reasonable doubt rule would become but one procedural option available when the legislature feels that the state should bear the risk of an erroneous finding of that fact.[147]

Despite the appeal of the argument, yielding the burden of proof to the legislatures is neither sound policy nor good constitutional law. As an initial matter, the situation is different from cases in which the due process equation changes because the defendant has a lesser interest at stake.[148] A legislative decision to call a particular fact either an element or a defense may become very important under the legislative scheme in determining who bears the burden of proof, but the label does not diminish the individual defendant's constitutional interest in freedom from erroneous conviction for behavior the legislature has decided is not criminal.

The lack of any meaningful difference in the defendant's interest based on whether a fact is called an element or a defense is starkly evi-

146. *See supra* notes 68-70 and accompanying text.

147. The Court, for example, has used a "sliding scale" approach to resolve right to counsel questions. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973) (right to counsel in probation revocation hearing decided on case-by-case basis); Morrissey v. Brewer, 408 U.S. 471, 489-90 (1972) (same holding for parole revocation hearings). The Court established the balancing approach to due process questions in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), in deciding that an evidentiary hearing was not required before terminating Social Security disability benefits. The sliding scale balances the individual's interest at stake, the burden on the state, and the increased reliability to be gained from additional safeguards. *Id.* at 343. The balancing approach has not been embraced unanimously. *See, e.g.*, Lassiter v. Department of Social Serv., 452 U.S. 18, 35 (1981) (Blackmun, J., dissenting) (ad hoc approach to right to counsel inappropriate given great liberty interest at stake with termination of parental rights).

148. The substantivist, of course, would argue that if a fact is not constitutionally required, it is of a lesser interest.

dent in the majority's opinion in *Martin v. Ohio.*[149] In upholding the state's shifting of the burden of persuasion for self-defense to the defendant, the majority explained: "[The defendant] . . . had the opportunity under state law and the instructions given to *justify the killing and show herself to be blameless* by proving that she acted in self-defense."[150] From Mrs. Martin's viewpoint, no logical distinction exists to explain why she should be more protected from wrongful punishment because an element is erroneously found to exist than if a justifying circumstance is erroneously found not to exist. The interest at stake—the wrongful deprivation of liberty based upon faulty fact-finding—is identical in either case.[151]

Because the defendant's interest is the same, any change in the due process equation must be founded upon a difference in the state's interest that would merit allowing the state to determine the burden of proof for a fact by labeling it an element or a defense. Such a justification might be argued in one of two ways: (1) certain facts are of less value than other facts, so it is acceptable that some individuals may be convicted even if the justifying or excusing circumstance is true; or (2) some facts may excuse or justify a defendant's act, but a risk of false claims exists that must be minimized. After examination, neither argument justifies granting the state such extensive control over when and how the presumption of innocence and the reasonable doubt rule apply.

The difficulty with the first justification, that the legislature can use the burden of proof to value defenses, is that it does not distinguish between individuals on a substantive rationale—one defendant acted reasonably in self-defense and the other did not—but on the random basis of how much evidence was generated.[152] Yet, one's actions are not more or less excusable based on how much evidence was produced. The individual who legitimately acted in self-defense with no witnesses present is as justified as the individual who acted in front of forty-two witnesses.

Once the legislature has recognized the factor as bearing on criminal responsibility, its availability should not be made to turn on whether the defendant acted under circumstances that generated a preponderance of

149. 480 U.S. 228 (1987).

150. *Id.* at 233 (emphasis added).

151. The state may claim a greater interest in adjusting the burden of proof because of perceived problems of proof, but the individual's interest at stake is identical. Dripps, *supra* note 29, at 1677. For discussion of why the state's arguably greater interest should not affect the due process calculus, see *infra* notes 152-60 and accompanying text.

152. For example, the Ohio legislature in *Martin* could be seen as saying, "It is acceptable that we convict certain individuals who acted in self-defense but cannot prove it by a preponderance of the evidence, because self-defense is not as 'good' an excuse as a pure accident."

evidence. While the reasonable doubt rule does not completely remove the effect of how much evidence is present, the standard minimizes this effect by granting the defendant the benefit of any reasonable doubt and denying the defense only to those individuals the jury is certain are not entitled to it.[153] To argue otherwise is to create in effect a category of "quasi-guilty" individuals whose convictions are justified because legitimate acts were done without generating sufficient proof.[154] Such a rationale is vaguely reminiscent of the medieval practice whereby although a "full-proof" did not exist to find the defendant guilty, the existence of a "half-proof" or "semi-proof" allowed punishment because the defendant was "semi-guilty."[155] If the legislature believes that certain defenses are

153. *See supra* note 24 (avoiding conviction of all innocent cannot be guaranteed).

154. These "quasi-guilty" individuals of course are found guilty by the jury and punished as such.

155. *See generally* J. HEATH, *supra* note 24, at 42; J. SELDEN, TABLE TALK OF JOHN SELDEN 257-58 (3d ed. 1860). Foucault describes the process as follows:

> The different pieces of evidence did not constitute so many neutral elements, until such time as they could be gathered together into a single body of evidence that would bring the final certainty of guilt. Each piece of evidence aroused a particular degree of abomination. Guilt did not begin when all the evidence was gathered together; piece by piece, it was constituted by each of the elements that made it possible to recognize a guilty person. Thus a semi-proof did not leave the suspect innocent until such time as it was completed; it made him semi-guilty; slight evidence of a serious crime marked someone as slightly criminal. In short, penal demonstration did not obey a dualistic system: true or false; but a principle of continuous gradation; a degree reached in the demonstration already formed a degree of guilt and consequently involved a degree of punishment. The suspect, as such, always deserved a certain punishment; one could not be the object of suspicion and be completely innocent. Suspicion implied an element of demonstration as regards the judge, the mark of a certain degree of guilt as regards the suspect and a limited form of penalty as regards punishment. A suspect, who remained a suspect, was not for all that declared innocent, but was partially punished. When one reached a certain degree of presumption, one could then legitimately bring into play a practice that had a dual role: to begin the punishment in pursuance of the information already collected and to make use of this first stage of punishment in order to extort the truth that was still missing.

M. FOUCAULT, DISCIPLINE AND PUNISH 42 (1979).

The use of torture today to generate the full-proof, of course, would be universally condemned. The analogy, however, stems from the idea that a defendant under Ohio's scheme in *Martin* could be punished as a murderer even if the state's evidence proved only "as likely as not" that the defendant did not act in self-defense. *Martin,* 480 U.S. at 237 (Powell, J., dissenting) ("Because [the defendant] had the burden of proof on [self-defense], the jury could have believed that it was just as likely as not that Martin's conduct was justified and yet still have voted to convict."); *cf.* Dove v. State, 3 Heiskell 348, 371 (Tenn. 1871):

> The absurdity . . . [of allowing a guilty verdict where there is a reasonable doubt as to insanity] will be more obvious by supposing that the jury should return a special verdict. It would be as follows: "We find the defendant guilty of the killing charged, but the proof leaves our minds in doubt whether he was of such soundness of memory and discretion to have done the killing willfully, deliberately, maliciously, and

more justifiable than others, more direct ways of expressing the value judgment are available. For example, the defense may be made to operate only as a partial defense, like heat of passion, or it may be made to produce other consequences, such as a commitment hearing after a successful insanity plea.[156]

The second premise, that the legislature wants to recognize the fact as an exonerating factor but minimize the risk of false claims, is more understandable. A legislature, for example, might reason: "Insanity should be an excuse, but if we recognize it as a defense the result will be twenty guilty individuals going free for every erroneous conviction avoided rather than the usual ten. Therefore, to restore the ratio we will place the burden of proof on the defendant." Despite the argument's appeal, several reasons counsel against its acceptance.

First, because the legislature is given such great leeway in deciding what burden of proof applies, the reasonable doubt rule in effect would be transformed from a constitutional right into a mere evidentiary rule. Except in extreme cases, the legislature would be free to decide whether the reasonable doubt rule or a lesser standard of proof should be used. At a minimum, this result undermines *Winship*'s suggestion that the presumption of innocence stands at the core of society's view of how the criminal justice system should work.[157] If the reasonable doubt rule "provides concrete substance for the presumption of innocence,"[158] the effect of taking away an independent role for the reasonable doubt rule is to leave the presumption of innocence consisting more of rhetoric than of substance.[159] The weighing of the risk of freeing the guilty against the

premeditatedly." Upon such a verdict no judge could pronounce the judgment of death upon the defendant.

The reasonable doubt rule, on the other hand, by giving the defendant the benefit of the doubt, eliminates conviction of the "semi-guilty." *See also supra* notes 137-41 and accompanying text (problem of accommodating culpability with all-or-nothing context of criminal verdicts).

156. For a more extensive discussion of how the legislature can use substantive changes to implement value judgments, see *infra* notes 167-68 and accompanying text.

157. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I] view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

158. *Id.* at 363 ("The [reasonable doubt] standard provides concrete substance for the presumption of innocence . . . .").

159. An analogous situation would occur if the Court recognized the right to counsel in felony cases, *cf.* Gideon v. Wainwright, 372 U.S. 335 (1963), but then decided the state is free to decide what constitutes a felony. A state, for instance, might call burglary a misdemeanor, prescribe a punishment of five years in jail, and then argue no right to counsel existed. The Court has foreclosed such a possibility by focusing not solely on felony-misdemeanor distinctions but also on whether actual incarceration has occurred. Scott v. Illinois, 440 U.S. 367,

injustice of convicting individuals who have not violated the law becomes a fact by fact process rather than a broad historical and constitutional judgment.[160]

Moreover, curtailing the reasonable doubt rule and the presumption of innocence is not necessary. Better ways that are more consistent with the emphasis of the presumption of innocence on avoiding erroneous convictions are available to confront the risk that a guilty individual will successfully avail himself of a defense. The undeniable cost of the presumption of innocence and reasonable doubt rule is that some guilty individuals will avoid conviction (of course, the cost does buy a significant gain in that innocent individuals are spared erroneous condemnation and punishment). Subjecting all facts the legislature uses in defining criminal responsibility to the presumption of innocence and the reasonable doubt rule, however, is far from swinging the jail door open for any individual who can stand up in court and claim insanity, self-defense, or some other legally recognized defense.

(2) Living with the Presumption of Innocence: Minimizing the "Costs"

One frequently cited tool available to control the use of defenses is the burden of production.[161] Unlike the burden of persuasion, the burden of production operates as an evidentiary "housekeeping" device, requiring the defendant to produce enough evidence so that a rational jury could find that a reasonable doubt exists.[162] By placing the burden of production on the defendant, the defendant is precluded from simply raising any potential defense and requiring the state to disprove it. Only those issues meriting consideration will be litigated and presented to the jury.[163]

372-74 (1979). Functionally defining innocence by evoking the legislature's use of the fact rather than its label would operate similarly.

160. The type of analysis that would result if balancing were allowed for each factor can be seen in United States v. Dominguez-Mestas, 687 F. Supp. 1429 (S.D. Cal. 1988), in which the district court expressly undertook such an analysis. The court placed the burden of proof for the duress defense on the defendant because the duress defense in drug cases posed difficult evidentiary problems and "[t]he social cost of drug abuse in our country is undeniably devastating." *Id.* at 1435. The court's weighing of the risks of erroneous conviction and acquittal in the specific context of drug smuggling raises the question whether a different balance can be argued when duress is a defense raised in a context not involving drug smuggling.

161. *See, e.g.,* Patterson v. New York, 432 U.S. 197, 230-31 (1977) (Powell, J., dissenting); A. CROSS, *supra* note 1, at 14-15; G. WILLIAMS, *supra* note 16, at 153; Underwood, *supra* note 17, at 1335-36.

162. Jeffries & Stephan, *supra* note 12, at 1334. The burden of persuasion—proving the issue beyond a reasonable doubt—shifts to the government once the defendant satisfies the burden of production.

163. Placing the burden of production on the defendant may not be entirely free from

A second safeguard from a flood of unwarranted acquittals is the jury itself. Discussions of the legal aspects of defenses like insanity and self-defense frequently ignore that once at trial such defenses are factual issues that the jury must find to be true or at least harbor a reasonable doubt that they are true. Juries, composed of members of the community, are not likely to find a reasonable doubt naively and uncritically whenever a defendant raises a claim of justification or excuse.[164] Although it may not be empirically provable, most jurors likely begin with skepticism toward a defendant's claim of justification or excuse.[165] The reasonable doubt rule simply guides the jury by telling them that after all the evidence has been presented, the benefit of the reasonable doubt must be given to the defendant and not to the state. The presumption of innocence and reasonable doubt rule do not require the jurors to leave their common sense and experience outside the jury room.[166]

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constitutional problems. In Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979), the majority noted that:

> [T]he effect of a failure to meet the production burden is significantly different for the defendant and prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases.

Cf. Patterson, 432 U.S. at 230-31 n.16 (Powell, J., dissenting) (outer limits exist on shifting burden of production).

A failure to meet the burden of production could be characterized as a directed verdict, especially if a presumption directs the jury to find the fact to be true unless the defendant meets the burden of production. *See* Roth & Sundby, *supra* note 32, at 475-77 (discussing potential constitutional problems of presumptions shifting burden of production); Note, *Presumptive Intent Jury Instructions After* Sandstrom, 1980 WIS. L. REV. 366, 374 (authored by David D. Cook) (presumptions that place production burden on defendant raise significant constitutional questions). Since *Sandstrom,* the Court has not expressed further approval or disapproval of using the burden of production. Burdens of production can be reconciled with a position maintaining that the government bears the burden of persuasion on an issue "if one assumes that the prosecution could prove beyond a reasonable doubt the absence of any exculpatory fact for which the defendant could produce no affirmative evidence." Jeffries & Stephan, *supra* note 12, at 1334.

164. *See generally* A. CROSS, *supra* note 1, at 13-14 (arguing that "the more improbable the defense, the harder it is to believe"); Underwood, *supra* note 17, at 1337 (factfinders will be skeptical of improbable claim).

165. One study suggests that although jurors on a limited basis import their own values into rendering a verdict, "there is every indication that the jury follows the evidence and understands the case." H. KALVEN & H. ZEISEL, *supra* note 129, at 494.

166. As Professor Underwood points out, jurors in federal court are instructed to assess the evidence "in the light of your common knowledge of the natural tendencies and inclinations of human beings." Underwood, *supra* note 17, at 1337 (quoting from 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTION § 15.01 (3d ed. 1977)); *cf.* State v. Caddell, 287 N.C. 266, 300, 215 S.E.2d 348, 369 (1975) (Sharp, C. J., concurring in result and dissenting in part):

> It is quite obvious that judges everywhere distrust the plea of unconsciousness and apprehend that jurors may repose hasty confidence in it. I think, however, there

The legislature's most direct way to control abuse of defenses derives from its power to define the substantive criminal law. If the legislature should decide that a particular factor is being abused, it can tighten the substantive requirements for the factor to operate as a justification or excuse. For example, a legislature may require an objective standard for self-defense and add requirements that an individual must avail himself of a safe retreat.[167] Similarly, the insanity standard of the state may be revised to a more stringent standard or perhaps abolished altogether as a

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is no need for such concern, since jurors are sensible people too. . . . In my view we can safely assume that ordinarily a defendant's unsupported plea of blackout will aid the prosecution rather than the defense.

The argument sometimes is advanced that the burden of persuasion for certain defenses is more appropriately placed on the defendant because proof of the fact is primarily within the defendant's knowledge or would require the government to prove a negative. As general propositions, these rationales do little to distinguish between facts. Because the defendant was the alleged actor in the crime, he almost always will be a better source of evidence. Similarly, many "affirmative" facts are just as difficult to prove as "negatives": proving that the defendant acted with a subjective state of mind is not inherently easier than proving that the defendant did not act under duress or in self-defense.

What such propositions rather imprecisely reflect is the more specific concern that defenses can be raised in a fashion that will make disproving them difficult. In a recent case, for instance, a court placed the burden of persuasion for duress on the defendant because:

> In the instant case the events surrounding this "immediate" threat of harm giving rise to the defendant's duress defense all occurred in Mexico. Witnesses to conversations between the defendant, the lender and the lender's agent on May 10, 1986, are in Mexico; witnesses to previous visit(s) to the defendant's sister in Magdalena are in Mexico and any evidence is in Mexico. As Mexico is a foreign country and beyond the government's subpoena power, the government has no access to any witnesses or evidence to disprove the defendant's duress. Requiring the government in such a situation to prove a negative, *i.e.,* the absence of duress beyond a reasonable doubt, is an almost impossible burden. Accordingly, it appears to be more practical and equitable to have the defendant prove his duress by a preponderance of the evidence.

United States v. Dominguez-Mestas, 687 F. Supp. 1429, 1434 (S.D. Cal. 1988).

If the government were required to prove the lack of duress *solely from its own direct evidence,* the court's reasoning would be valid. The effect of requiring the defendant to bring some evidence forward to meet the burden of production coupled with the jury's critical eye, however, makes the government's task far from "impossible." The government through cross-examination and analysis of the defendant's evidence, circumstantial evidence, and logical inferences still has ample opportunity to show that no reasonable doubt exists based on the totality of the evidence presented. The real question at issue is not an evidentiary problem unique to duress, but the question inherent to the presumption of innocence: given that facts often cannot be conclusively proved, who should bear the risk of an erroneous finding. The defendant, after all, may have the same difficulties in gaining access to the direct evidence.

167. Some states currently, for example, do not impose an obligation to retreat if a safe retreat is available or allow the reasonableness of use of force to be judged from the defendant's situation. *See generally* W. LAFAVE & A. SCOTT, supra note 94, at 460-61 (discussing different retreat requirements); Rosen, *supra* note 119, at 31-32 (different approaches to judging reasonableness of belief). The Model Penal Code would not even require a reasonable belief of the necessity of self-defense, only an honest one. MODEL PENAL CODE § 3.04(1) (1962).

basis for acquittal and transformed into a sentencing factor.[168] The concern with protecting society against dangerous individuals would be accomplished through the substantive law and not procedural manipulation.

The inevitable counterargument is that placing the price tag of the reasonable doubt rule on every factor that the legislature decides is a basis for acquittal will stifle law reform, leading to the abolition of defenses or an extreme tightening of the requirements.[169] The argument has tinges of jurisprudential blackmail: demand too much certainty in what the government must prove and the defense will be abolished altogether or greatly curtailed.[170]

Such doomsday predictions are ill-founded, at least for factors that result in complete acquittal for criminal charges.[171] First, those factors that currently result in acquittal are not legislative flights of fancy likely to be cast away in a huff simply because the burden of proof has been changed. When a legislature decides that a factor should justify or excuse certain behavior from criminal responsibility, such a decision reflects a studied view that society would not condemn such behavior.[172] It is difficult to believe that a legislature would react so rashly to the relatively few threshold factors society has decided distinguish criminal from innocent behavior.[173] A defense like self-defense, for example, represents

168. *See generally* N. MORRIS, MADNESS AND THE CRIMINAL LAW 28-87 (1982) (arguing for abolishing insanity defense and making insanity a factor for sentencing). The recent trend has been to move from more lenient insanity tests to the traditional but stricter standard of the M'Naghten test. *See* J. DRESSLER, *supra* note 94, at 297 ("the law appears to be going full circle and returning to the *M'Naghten* rule").

169. *See supra* notes 50-51 and accompanying text.

170. As Professor Dripps has observed: "The logic of the compromise argument thoroughly undercuts the apparent liberality of those who proffer this rationale." Dripps, *supra* note 29, at 1711.

171. The danger may be greater for grading factors rather than for facts that result in guilt-innocence determinations, but see *infra* note 187.

172. Given the political trade-offs involved in the legislative process, some may object to coupling the phrase "studied view" with the passing of legislation. If one views the substantive criminal law as an expression of societal norms, however, part of the legislature's "studies" will include taking the political pulse of the public. A legislature also can be sure that it will receive input from judges through judicial opinions and from others paid to be critics (*i.e.*, law professors). Moreover, most guilt-innocence factors, such as insanity, have common-law roots, and their merits have been debated extensively, sometimes for centuries. *See* Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966) (tracing "essential concept" of right-wrong test back to Roman law). The issue presented by the reasonable doubt rule is in what form the legislature's conclusions can be expressed: by changing the substantive law or through procedural changes in the burden of proof?

173. A basic list might include self-defense, necessity, duress, insanity, mistake of fact, and involuntary physical acts. Even these defenses are limited in application; necessity and duress,

historically accepted—even valued—behavior.[174] Any effort to abolish self-defense undoubtedly would be met by a hue and cry with repercussions at the voting booth.

Moreover, even if legislative rationality and democratic pressures should fail on rare occasion, constitutional checks exist for flagrant legislative excesses. Efforts to abolish defenses like self-defense, insanity, and duress would be subject to strong constitutional challenges.[175] Although the Constitution may not operate well as a means of delineating the substantive criminal law,[176] the eighth amendment and due process clause are capable of catching legislative abuses that violate fundamental notions of fairness.

Most importantly, legislative reaction within constitutional bounds is not necessarily a regressive development. In fact, much can be said for requiring a legislature to decide if a particular factor is so important to societal perceptions of criminal responsibility that an individual should not be convicted if a reasonable doubt exists that the factor was present. To argue otherwise is to say that it is the likelihood that the factor can be proven, and not the merits of the factor itself, which controls its adoption. Something is askew if insanity is retained as a defense not because its presence excuses an individual's behavior, but because we can be assured that those who are not insane are unable to gain acquittal using this defense.

This is the crux of the debate between allowing legislatures to use procedural compromises like lower burdens of proof to deal with the risk of erroneous acquittals or requiring them to face the problem through defining the substantive criminal law. With either procedural or substantive compromises, certain individuals will lose the ability to claim a defense successfully. With procedural compromises, the defense is one recognized by the legislature and society as legitimate, but made unavailable because the defendant is not given the benefit of the reasonable doubt. The wronged defendant is one whose acts *were* proper or excusa-

for example, are often not available for murder. W. LAFAVE & A. SCOTT, *supra* note 94, at 437 (duress), 445 (necessity).

174. *See generally* Rosen, *supra* note 119, at 27-30 (comparing justification and excuse theories of self-defense). Self-defense actually was not considered a complete excuse for a killing until the nineteenth century. *Id.* at 25-27 (tracing history of self-defense); Wechsler & Michael, *A Rationale of the Law of Homicide: I,* 37 COLUM. L. REV. 701, 737 (1937) (discussing argument that self-defense over long run will save more lives by acting as deterrent).

175. *See generally* J. DRESSLER, *supra* note 94, at 314-16 (constitutionality of abolishing insanity defense may depend on whether defendant can still argue *mens rea* is missing); W. LAFAVE & A. SCOTT, *supra* note 94, at 310 (discussing constitutionality of abolishing insanity defense).

176. *See supra* notes 89-122 and accompanying text.

ble, but he or she cannot prove it and bears the risk of nonpersuasion. With substantive compromises, the defense is unavailable because society through the legislature has decided, perhaps in part because of the risk it will be abused, that the defense should not be available to justify or excuse the behavior.

In both situations the unavailability of the defense may be seen as unfortunate, but the first category of cases is more unjust because the defendant's actions in fact were not criminal under the law. The core purpose of the presumption of innocence is involved: preventing the erroneous condemnation and punishment of those who did not violate society's norms as expressed through criminal law. The individual in the second category, in contrast, can claim an injustice only on the basis that his behavior should have been recognized by the law as not being culpable, but the legislature did not so choose.

Ultimately, restrictive proceduralism's challenge is to explain either why the presumption of innocence does not attach to those facts that a legislature recognizes as providing a basis for acquittal or, if it does attach, why the historical and constitutional balance struck by the reasonable doubt rule should be altered for facts that functionally exonerate the defendant but are not labelled elements of the crime. The answers are not readily discernible from the Supreme Court's opinions embracing the restrictive proceduralist viewpoint.

C. Limiting the Meaning of Innocence: A Dialogue with the Expansive Proceduralist

What emerges from the foregoing critiques of substantivism and restrictive proceduralism is a view of the presumption of innocence that focuses on the jury verdict at a criminal trial as a judgment on whether the defendant has abided by societal norms. Once the presumption of innocence is viewed in this way, as a concept concerned with how a fact functions within the legislative scheme, expansive proceduralism surfaces as the approach that best protects the values at stake. Substantivism fails by limiting innocence to a constitutional definition of culpability; it does not account for the interest in not being found to have violated the criminal code, the legislature's enactment of current societal standards. Restrictive proceduralism's shortcoming, on the other hand, is its willingness to allow legislatures, simply by labeling facts as elements or defenses, to determine the amount of risk that can be tolerated for convicting individuals who in fact have abided by the legislatively prescribed code of conduct. Only expansive proceduralism, by extending the reasonable doubt rule based on whether the legislature uses the fact to define

criminal responsibility, adequately implements the presumption of innocence in the criminal trial context.

The expansive proceduralist's dilemma is that although extending the reasonable doubt rule to all facts the legislature has chosen to rely on for delineating criminal responsibility best protects the presumption of innocence, it also reduces the chances for judicial acceptance. The specter is of the reasonable doubt rule blindly being extended to all facts within the legislative scheme. Arguably the Court's full retreat to restrictive proceduralism was an overstated backlash to the implications of *Mullaney*'s expansive proceduralist tone.[177] If the expansive proceduralist can offer some limits, the likelihood of the approach's adoption is considerably greater.

Drawing lines, however, poses special problems for the expansive proceduralist. Acknowledging that a distinction can be made for the reasonable doubt rule between facts bearing on criminal responsibility threatens to undermine the approach's most basic premise: that the applicability of the presumption of innocence should not depend on an independent evaluation of a fact's substantive importance, but on how the legislature has used the fact.[178] If the expansive proceduralist allows that one fact can be more important than another, the door is cracked to the argument that all facts should be subject to an independent analysis. Is insanity as "important" as the lack of intent? Is the defendant who kills in self-defense as culpable as the defendant who kills accidentally?[179] Once this line of analysis is begun, the meaning of the presumption of innocence becomes removed from the context of the criminal trial and what the jury is charged to determine.

How can a line consistent with expansive proceduralism be drawn, therefore, if the Court is unwilling to extend the reasonable doubt rule to

177. *See supra* notes 68-70 and accompanying text.

178. An exception could be made for facts solely bearing on issues of jurisdiction and admissibility of evidence. *See* Underwood, *supra* note 17, at 1341-48 (suggesting such factors need not be subject to the reasonable doubt rule). As a general proposition these facts would qualify as nonexculpatory public policy defenses. *See* Robinson, *supra* note 137, at 229-32. Such defenses are "not based on a lack of culpability . . . [but] are purely public policy arguments." *Id.* at 230. The difficulty with such an exception is that not all defenses are so neatly categorized. *Id.* at 236-39 (entrapment can be viewed as either excuse or nonexculpatory defense). To avoid having the exception swallow the rule, such an exception might best be limited to those facts that without question do not bear on the issue of the defendant's criminal responsibility. *See id.* at 230-31 (statute of limitations, double jeopardy, and the exclusionary rule do not bear on culpability); *cf.* Lego v. Twomey, 404 U.S. 477, 486-87 (1972) (voluntariness of confessions need only meet preponderance of evidence standard).

179. For the argument why such distinctions are improper for the presumption of innocence, see *supra* notes 125-45 and accompanying text.

all facts within the legislative scheme?[180] The most promising prospect may be a variation of the one proposed by Justice Powell in his *Patterson* dissent. Justice Powell proposed to draw the line based on two criteria: whether a fact makes a "substantial difference in punishment and stigma" and whether the fact historically has "held that level of importance."[181]

The promise in Justice Powell's approach does not lie with his historical test. That criterion's usefulness in implementing the reasonable doubt rule is unclear at best. Historical recognition probably was envisioned as an objective check to ensure that the fact was sufficiently important to apply the reasonable doubt rule. What Justice Powell fails to explain, however, is how historical acceptance of a fact's role in defining criminal behavior makes the fact any more important for applying procedural protections. Why is a fact that traditionally has made a difference in punishment between twenty years and life imprisonment any more important for the presumption of innocence than a newly enacted factor that also carries a difference in consequence of twenty years and life imprisonment? One can properly argue that a procedural safeguard should or should not apply because historical practice shows that such a use was not the rule's purpose, but the historical argument makes no sense when used to deny the right to a "new" fact when all the historical reasons for providing the right exist.[182]

Justice Powell's other criterion—whether the fact makes "a substantial difference between punishment and stigma"—is much more sensible and bears directly on the reasonable doubt rule's purpose. The criterion,

180. The Court particularly is apt to draw lines in the criminal procedure area. One example is the Court's decision regarding the right to counsel. In Scott v. Illinois, 440 U.S. 367 (1979), a majority limited the right to counsel for misdemeanors to cases in which the defendant was actually imprisoned. The line of actual imprisonment was not entirely consistent with previous right to counsel cases, which had focused on the complexity of issues presented by a case and not the penalty imposed. *Id.* at 382 (Brennan, J., dissenting) (actual imprisonment standard ignores prior precedent). Justice Rehnquist, the author of *Scott,* had joined a dissent in an earlier case that had criticized the majority's opinion for lacking logical limits to extending the right to counsel. Argersinger v. Hamlin, 407 U.S. 25, 47 (1972) (Powell, J., dissenting). Even more blatant line-drawing occurred in Kirby v. Illinois, 406 U.S. 682 (1972), in which the Court limited the right to counsel at lineups on the chronological basis of whether indictment occurred. Yet, all of the reasons counsel was required at lineups existed at the preindictment stage. *Id.* at 692 (Brennan, J., dissenting) (majority's reasoning is "mere formalism").

181. Patterson v. New York, 432 U.S. 197, 226 (1977) (Powell, J., dissenting). The basis of the test can be seen in Justice Powell's majority opinion in Mullaney v. Wilbur, 421 U.S. 684 (1974), but he did not formalize the criteria as a test until his *Patterson* dissent.

182. The historical test has also been criticized because it would impede law reform by "exalting the traditional law of crimes and fixing its content as a normative standard for constitutional adjudication." Jeffries & Stephan, *supra* note 12, at 1364.

however, has been criticized as "conceptually schizophrenic" because it arguably uses a substantive factor to limit the reasonable doubt rule's scope while maintaining proceduralism's deference to legislative authority:

> [Justice Powell's proposed] scheme is conceptually schizophrenic. It proposes a rule that is entirely procedural in consequence—that is, a rule that would disallow shifting the burden of proof even as it recognizes legislative authority to redefine the substance of the law. Yet this ban against burden-shifting devices would apply only when the substantive issue involved makes, and in the Anglo-American legal tradition has made, a substantial difference in punishment and stigma. In other contexts, apparently, departures from the reasonable-doubt standard would be allowed. The result of this rule would be a striking incongruence between the consequence of the doctrine (entirely procedural) and the conditions governing its applicability (overtly substantive). We know of no plausible rationale to bridge that discontinuity.[183]

To the extent that Justice Powell tries to distinguish between facts while maintaining a proceduralist approach, some "discontinuity" is inevitable. The approach, however, at least searches for limits within the framework of a proceduralist's philosophy that the reasonable doubt rule should reflect the legislature's use of facts and not rely on an independent constitutional assessment of the fact's substantive importance. A court would have to decide what is a "substantial difference," but it would do so by looking at the fact's effect within the legislative scheme of punishment rather than utilizing abstract concepts of culpability. The proposed criteria might be better thought of as "quasi-procedural" than substantive, because a fact's importance is still derived from the legislature's decision to use the fact as a significant factor for measuring criminal responsibility.[184] Justice Powell's approach perhaps is not so much schizophrenic as it is a proceduralist's id restrained by a substantivist's super ego.[185]

If a line is to be drawn, Justice Powell's criterion focusing on the "substantial difference in punishment and stigma" offers the best resolution.[186] The approach preserves the focus on the penal code as the legis-

183. *Id.* at 1362-63.

184. Even Justice Powell's historical prong reflects a proceduralist orientation. The prong focuses on whether the legislature (and common law) has treated the fact as historically important. The emphasis again is on how the fact has been used, not on an independent judicial judgment of the fact's importance.

185. *See* S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (J. Rivieve trans. 1935).

186. Although Justice Powell's test has not gained majority support since *Mullaney*, his basic position had the support of three other justices in *Patterson* and *Martin*. It is difficult to think of a line that would limit the reasonable doubt rule's scope further without taking away

lature's expression of societal norms for defining issues of criminal responsibility. The Court will have to decide what is a "substantial difference" in punishment, but the question is certainly easier than developing a constitutional doctrine of culpability. Moreover, the approach preserves an independent constitutional role for the reasonable doubt rule by declaring that once the legislature uses a fact in a particular way, the burden of proof issue is beyond legislative control. A legislature cannot affect the burden of proof by attaching a label, but it is bound by the effect it gives a fact in the legislative scheme. The approach might not be perfect or theoretically pure, but it offers viable limits without undermining the purpose of the presumption of innocence.[187]

Conclusion

The criminal law is not a static body of liability rules. Perhaps in no other area of the law does society express its normative beliefs more directly than in deciding what constitutes criminal behavior. Changing views of criminal responsibility will be reflected by the legislature as it decides questions like the proper test for insanity or the breadth of the right to self-defense. The dynamic nature of the criminal law is further enhanced by federalism, which entrusts the substance of the criminal law primarily to the states.

Of equal importance to the state's control over what constitutes criminal behavior is the purpose of the presumption of innocence, guarding against erroneous convictions. The presumption of innocence is given meaning at the criminal trial through the reasonable doubt rule, which in effect tells the jury that when deciding if the defendant has violated the criminal law, the greater injustice would be in wrongfully condemning someone who was not criminally responsible.

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the focus on the legislature's use of facts. Justice Powell's approach, at least absent the historical prong, thus stands as the best offer of providing some limits consistent with a functional view of the presumption of innocence.

187. The test also weakens the objection that extending the reasonable doubt rule to all facts would lead legislatures to abandon progressive law reforms. *See supra* notes 50-51 and accompanying text. The argument that legislatures will abolish such defenses must assume that such facts were so precariously agreed upon that the legislature will abandon them once the price tag of the government bearing the burden of proof is attached. Yet, if a legislature already has utilized a fact in a manner leading to a "substantial difference" in punishment, it obviously views the fact as one of importance to assessing criminal responsibility. The objection too quickly dismisses both the public and the legislature's interest in having a criminal code that reflects a rational and fair system of criminal liability and punishment. *Cf.* Dripps, *supra* note 29, at 1712 (suggesting legislatures do not always avoid placing burden of proof on the government when expanding legal defenses).

In defining the innocence that the reasonable doubt rule protects, these two aspects of the criminal justice system must be harmonized: the state's right to define the nature of criminal responsibility and the constitutional and societal concern over punishment of an individual who in fact acted in accord with the criminal law. Only if innocence is defined in terms of the legislature's use of facts to determine criminal liability can the presumption of innocence both reflect the criminal law as an expression of societal norms and protect against wrongful condemnation. The jury's power to convict and society's right to punish are premised upon the legislature's choice of facts in defining criminal behavior, and the presumption of innocence must be viewed as a function of that process. Any other approach to defining innocence and the scope of the reasonable doubt rule will either underplay what the criminal law represents or lead to the principle that it is acceptable to punish individuals when doubts exist as to their criminal guilt.